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Reported by the Commission

FEDERAL COMMUNICATIONS COMMISSION

RICHARD E. WILEY, Chairman
ROBERT E. LEE
CHARLOTTE T. REID
BENJAMIN L. HOOKS

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F.C.C. 74-196

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 97 TO ALLOW THE COMPENSATION IN CERTAIN INSTANCES OF CONTROL OPERATORS OF STATIONS OPERATING IN THE AMATEUR RADIO SERVICE AND MODIFICATION OF THE LOGGING REQUIREMENTS REGARDING THIRD PARTY COMMUNICATIONS	Docket No. 19605

REPORT AND ORDER

(Adopted February 27, 1974; Released March 4, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. On October 11, 1972, the Commission released a Notice of Proposed Rule Making in the above captioned matter. The Notice was published in the Federal Register on February 5, 1973 (37 F.R. 22002) and requested comments be filed by interested parties by December 20, 1972, and reply comments by January 3, 1973. Comments were received from the following individuals and organizations: Robert G. Farricy, the Los Angeles Disaster C. D. Radio Council, Paul Schuett, the North Carolina FM Repeater Association, Inc., Pioneer Valley Repeater Association, Inc., the American Radio Relay League, Inc. (ARRL), Explorer Port 65, B.S.A., and Sam McCluney.

2. Our Notice looked toward the amendment of Part 97 in two areas. First, we proposed to permit regular control operators of an amateur radio station meeting certain specified criteria to receive compensation for their work. The intent was to provide a basis for the ARRL to compensate their employees for work performed in operating station W1AW. Heretofore, these employees were permitted to receive compensation without jeopardizing their amateur radio license under a special waiver authorized in the Notice. Secondly, we proposed to modify or delete Section 97.103(b)(3) concerning the requirements for recording third party traffic handling data in an Amateur Radio station log.

3. All but one of the comments filed regarding the compensation of control operators supported our proposed rule. Both the ARRL and the Pioneer Valley Repeater Association Inc., took the position that stations which could meet the criteria set forth in our Notice were providing a valuable service to a very large segment of amateur licenses and that reasonable compensation would insure continuance of such activities. On the other hand, Sam McCluney took the position that there should not be any paid amateurs and that our proposed rule "using reasonable measures to maximize coverage" was vague. In addi-

104-028—74——1

tion, the Los Angeles Disaster C.D. Radio Council filed a comment which asked that we extend our proposed rule regarding compensation to RACES control operators.

4. Under the terms of our Notice, if an amateur station could meet three criteria, the control operator of that station would be allowed to receive compensation. The criteria proposed were (1) the station must be operated at least 40 hours per week (2) on all the allocated high frequency amateur bands using reasonable measures to maximize coverage (3) according to a published schedule. The Commission finds that it is desirable in the public interest to have at least one amateur station transmitting bulletins, informational matter, and telegraphy practice on a regular basis as a service to all amateur radio operators. This finding is in fact consistent with the purpose of Section 97.91 (b) and (d). The Commission recognizes that it is impractical to operate such a station for a substantial period of time using only volunteer control operators.

5. We are adopting the rules essentially as proposed in our Notice. However, we are making certain editorial changes to clarify our intent and the permissible extent of the compensation. Subparagraph (b) (1) has been amended to clearly indicate that the station must operate for at least 40 hours per week with telegraphy practice and bulletin transmissions. A general provision has also been added to indicate that a control operator may receive compensation only for the period during which the station is transmitting telegraphy practice and bulletins. Compensation may not be accepted for operating the station for other amateur radiocommunication. In their comments, the American Radio Relay League requested the additional requirement of operation in the MF (medium frequency) 160 meter band. We find the ARRL requested additional requirement of operation in the 160 meter frequency band acceptable, and it will be adopted. We reject the argument that the rule is vague. Specifically to the phrase "using reasonable measures to maximize coverage", we find that it is sufficiently precise, within the context of this proceeding, to inform all parties as to what is required. The rules adopted herein, while intended primarily for W1AW, do not preclude the compensation of control operators at other amateur radio stations operated in compliance with the rule requirements.

6. We find that our proposed rule on the compensation of control operators as set forth in the attached appendix to our notice, is not only justified but will enhance the Amateur Radio Service by insuring that material of interest solely to amateurs will continue to be adequately disseminated. The suggestion by the Los Angeles Disaster C.D. Radio Council is not being adopted. We do not wish at this time to express a view as to the wisdom of compensating control operators of RACES stations. Such a question is very broad and involves many aspects requiring more thorough consideration than is available in this limited docket and would be better considered eventually in Docket 19723.

7. With regard to our proposed logging requirements, several of the comments stated that it was difficult to comply with the third party logging requirements and suggested various ways to modify Section 97.103(b) (3) to make it easier for the licensee to comply with it. The

Commission has some difficulty understanding the rationale of the comments which stated that it was more difficult to comply with the present third party logging rule than it was to comply with the old rule. Instead of requiring each station to maintain an actual copy of the third party message as was the case with the old rule, we now only require a notation of the message content and the names of the participants, i.e. the control operators of the amateur stations involved and the names of all parties to the third party message.

8. The Commission finds that there is a continuing need for the information required by Section 97.103(d)(3) particularly with the proliferation of the use of phonepatch and autopatch facilities. The information contained in amateur station logs is the only way in which the Commission can obtain an accurate assessment of the extent and nature of third party traffic. The Commission believes this logging requirement at worst to be only a slight burden to the licensee, especially in light of the acceptability of automatic logging. Accordingly, the Commission will not modify or delete Section 97.103(d)(3).

9. We find that attached amendments to the rules are necessary, desirable and in the public interest. Authority for adoption of these amendments is contained in Section 4(i) and 303 of the Communications Act of 1934, as amended.

10. Because the rules adopted herein relieve restrictions on the operation of Amateur Radio Stations, and the procedural and effective date provisions of 5 U.S.C. 553(d)(1) do not apply, IT IS ORDERED that these rules are effective March 12, 1974.

11. It is further ordered, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT A. MULLINS, *Secretary.*

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

"1. In Section 97.112 the present text is designated as paragraph (a) and a new paragraph (b) is added to read as follows:

"Section 97.112 No remuneration for use of station.

* * * * * * *

"(b) Control operators of a Club Station may be compensated when the club station is operated primarily for the purpose of conducting amateur radiocommunication to provide telegraphy practice transmissions intended for persons learning or improving proficiency in the International Morse Code, or to disseminate information bulletins consisting solely of subject matter having direct interest to the Amateur Radio Service provided:

"(1) The station conducts telegraphy practice and bulletin transmission for at least 40 hours per week;

"(2) The station schedules operations on all allocated medium and high frequency amateur bands using reasonable measures to maximize coverage.

"(3) The schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions.

"Control operators may accept compensation only for such periods of time during which the station is transmitting telegraphy practice or bulletins. A control operator shall not accept any direct or indirect compensation for periods during which the station is transmitting material other than telegraphy practice or bulletins."

F.C.C. 74-179

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of BINGHAM COUNTY CABLE TELEVISION CO., PORTIONS OF BINGHAM COUNTY, IDAHO For Certificate of Compliance	CAC-1092 ID072

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 26, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On August 25, 1973, Bingham County Cable Television Company filed an application for a certificate of compliance for a new cable television system to serve portions of Bingham County, Idaho (located in the Idaho Falls-Pocatello smaller television market). Bingham's application proposes carriage of the following television signals:

KID-TV (ABC/CBS, Channel 3), Idaho Falls, Idaho.
KIFI-TV (ABC/NBC, Channel 8), Idaho Falls, Idaho.
KBGL-TV (Educ., Channel 10), Pocatello, Idaho.
KPTO [1] (C.P., Channel 6), Pocatello, Idaho.
KCPX-TV (ABC, Channel 4), Salt Lake City, Utah.
KSL-TV (CBS, Channel 5), Salt Lake City, Utah.
KUTV (NBC, Channel 2), Salt Lake City, Utah.
KUED (Educ., Channel 7), Salt Lake City, Utah.
KWGN-TV (Ind., Channel 2), Denver, Colorado.
KBYU-TV (Educ., Channel 11), Provo, Utah.

Objections to carriage of Stations KSL-TV, KUTV, and KCPX-TV (all Salt Lake City, Utah) were filed by KID Broadcasting Corporation, licensee of Station KID-TV, and The Post Company, licensee of Station KIFI-TV, and Bingham has replied.

2. In its application, Bingham justifies its proposal to carry the CBS and NBC network affiliates from Salt Lake City on the ground that Stations KID-TV and KIFI-TV do not carry 85 percent of the prime-time weekly network programming between 5:00 and 10:00 p.m., and therefore do not qualify as full network stations, as defined in Section 76.5(1) of the Commission's Rules.[2] Alternatively, applicant seeks waiver of Section 76.59 of the Rules because cable systems operating in the nearby communities of Idaho Falls and Pocatello

[1] Eastern Idaho Television Corporation, permittee of Television Broadcast Station KPTO, was granted its initial construction permit until April 18, 1973. It requested and received a grant (BMPCT-7466) to extend the completion date to February 9, 1974. KPTO has never been on the air.

[2] Section 76.5(1) of the Rules defines a "full network station" as follows: "A commercial television broadcast station that generally carries in weekly prime time hours 85 percent of the hours of programming offered by one of three major national television networks with which it has a primary affiliation" (i.e., right of first refusal or first call).

already carry Salt Lake City network stations. Bingham maintains that because no adverse impact on KID–TV and KIFI–TV from this carriage has been demonstrated, carriage of those Salt Lake City signals in and around Blackfoot, which is a much smaller community, will similarly have no adverse impact. In support of the waiver request, Bingham cites *Pueblo TV Power, Inc.*, 22 FCC 2d 734, *reconsideration denied*, 22 FCC 2d 911 (1970), in which, it is claimed, the Commission allowed importation of distant signals where a cable system in the same market, but not the same community, was already carrying them.

3. In their objections, KID and Post allege that because they are local full network stations, carriage of the NBC and CBS Salt Lake City affiliates is inconsistent with Section 76.59 of the Rules.

4. In a recently decided case, *Bingham County Cable Television Company*, FCC 73–1202, FCC 2d ——, involving the same cable company's identical proposed operations in a neighboring city,[3] we found that the arguments of all three parties with respect to the full network status of KID–TV and KIFI–TV were insufficient to enable us to make a proper determination. We therefore ruled that it was appropriate to defer action on the proposed carriage of the NBC and CBS Salt Lake City affiliates. We also denied Bingham's request for waiver of Section 76.59, while finding Bingham's proposal to carry Station KCPX–TV (ABC), Salt Lake City, Utah, to be consistent with our Rules. Because the issues and arguments presented in that case are the same as those presented here, our previous ruling is applicable and the question raised shall be deferred.

5. Bingham has filed a petition for special relief requesting waiver of the franchising-holding requirement of Section 76.31 of the Rules because there is no appropriate authority to grant a franchise in Bingham County.[4] Pursuant to Paragraph 116, *Reconsideration of Cable Television Report and Order*, FCC 72–530, 36 FCC 2d 186, Bingham has submitted an alternative proposal in lieu of a franchise, as follows: (a) substantial construction will be completed during the first year after grant of the certificate, and complete construction will occur within three years following the grant; (b) a new certificate will be applied for within ten years; (c) subscriber rates will be filed with the Blackfoot, Idaho, City Clerk and may not become effective until sixty days thereafter; (d) a local office for the reception of complaints and repair requests will be maintained during all usual business hours; (e) Bingham will comply with the requirements of any modifications in Section 76.31 of the Rules. We find that Bingham's alternative proposal assures compliance with the substance of Section 76.31. Therefore, a certificate of compliance will be issued until March 31, 1977. This grant is made subject to any further orders of the Commission designed to resolve general problems inherent in non-franchised cable operations, or to address any special problems

[3] Bingham proposes to serve both Blackfoot, Idaho, and portions of Bingham County, Idaho, from the same headend.

[4] Letters to the Commission from Mr. Clarence D. Suiter, Chief Deputy Attorney of Idaho, and Mr. Kenneth F. Clarke, Prosecuting Attorney for Bingham County, Idaho, have so advised.

that may be brought to the Commission's attention involving cable operations in the subject community.

In view of the foregoing, the Commission finds that a partial grant of the application for portions of Bingham County, Idaho, would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Opposition to Issuance of Certificate of Compliance" filed October 30, 1972, by KID Broadcasting Corporation and the "Objection of The Post Company to Application for Certificate of Compliance" filed October 30, 1972, by The Post Company, ARE DENIED to the extent reflected herein.

IT IS FURTHER ORDERED, That Bingham County Cable Television Company's application (CAC–1092) IS GRANTED to the extent reflected herein and is otherwise deferred, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-206

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 76 OF THE COMMISSION'S RULES AND REGULATIONS RELATIVE TO OBLIGATIONS OF CABLE TELEVISION SYSTEMS TO KEEP RECORDS OF SUBSCRIBERS

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 5, 1974)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. In the year and a half since our adoption of the *Cable Television Report and Order*, 36 FCC 2d 143, we have had cause to be concerned whether our existing cable television rules provide adequate procedures for accurate collection of fees from cable television systems. Administration of our cable television fee schedule [1] has pointed up problems in verifying systems' computations of annual fees. We thus find a need to codify record keeping requirements for cable television systems.

2. Our fee schedule requires a cable television system to count its subscribers on a quarterly basis in order to compute its annual fee, but does not specify how the system must preserve the raw information of the count.[2] Though most cable operators apparently make good faith efforts to compute their fees properly, indications are that they use widely varying methods of defining and counting subscribers. And without a method of preserving the underlying data, our enforcement program cannot function properly. At a bare minimum, systems must keep their records internally consistent.

3. We therefore find that a record keeping requirement is in the public interest. In this regard, we do not believe that the rule will impose any serious burdens upon cable television systems. Systems have the required information already; the rule just states that they must maintain it and make it available to the Commission.

4. Section 76.306's requirement that cable operators retain records of their subscriber counts for Commission inspection is designed to aid Commission personnel in verifying the annual fee computations which the rules already require. As indicated in paragraph 2, we are

[1] This was adopted as part of our general schedule of fees for all services which the Commission regulates, in our *Report and Order in Docket No. 18802*, FCC 70-694, 23 FCC 2d 880.

[2] Section 1.1116 of the Rules provides that: "An annual fee shall be paid by each CATV system on or before April 1 of each year for the preceding calendar year. The fee for each system shall be equal to the number of its subscribers times 30 cents. The number of subscribers shall be determined by averaging the number of subscribers on the last day of each calendar quarter." (See § 1.1102(c).)

concerned not that cable systems deliberately are falsifying subscriber counts, but rather that they are not maintaining sufficient information to permit meaningful field checks. Accordingly, Section 76.306 would neither specify any particular form for subscriber count information nor require cable systems to record information which they otherwise do not maintain. Instead, it provides only that they must retain for three years any subscriber records which they keep in the normal course of business.[3] Cable systems thus may comply with the rule simply by keeping on hand and making available their customary subscriber records—e.g., billing slips, customer history accounts, or the like. The rule does not require cable systems to institute any new record keeping procedures and therefore should not present any hardship. Nor does it require systems to open up their offices and files for physical inspections; they need only "submit" the records to an authorized Commission representative in any reasonable and convenient way.

5. Cable systems must retain records of all subscribers, however, whether paying or non-paying. Our cable rules and our fee schedule apply to all subscribers, regardless of their financial relationship with a system; any other approach would ignore the fact that subscribers have the same impact for regulatory purposes whether or not they pay for service.

6. The new rule thus should not cause any undue inconvenience, since it does not require cable operators to produce material which they do not normally maintain. Through greater disclosure we hope to encourage a greater interaction between the Commission and the cable industry.

7. We find that prior notice of rulemaking would not be appropriate or in the public interest here, since speedy adoption of the rule is essential. We will mail out the forms for fee computations shortly, and cable systems must file their Form 326–A computations of annual fees by April 1, 1974. Accordingly, any delay in implementing the rule would make our enforcement effort nugatory for the coming year, since cable systems would not be required to have any means by which we could audit or validate their subscriber counts. See, e.g., *Arizona State Department of Public Welfare* v. *HEW*, 449 F. 2d 456 (9th Cir.), *cert. den.*, 405 U.S. 919 (1971). Moreover, prompt adoption of the rule will facilitate cable systems' retention of records by clarifying their obligations. *Buckeye Cablevision, Inc.* v. *FCC*, 387 F. 2d 220 (D.C. Cir., 1967).

8. Authority for the rule amendment adopted herein is contained in Sections 2, 4 (i) and (j), 303, 307, 308, and 309 of the Communications Act of 1934, as amended.

Accordingly, IT IS ORDERED, That effective April 12, 1974, Part 76 of the Commission's Rules and Regulations IS AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION.
VINCENT J. MULLINS, *Secretary.*

[3] Where a cable system does not keep records in the normal course of its business, it thus need not maintain or submit any records under Section 76.306. We expect this type of situation to be quite rare, however, since most systems keep records either for their own internal purposes or for tax and regulatory authorities. We note that at least one state regulatory authority, the New York State Commission on Cable Television, has decided to adopt just such record keeping requirements

APPENDIX

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

"Section 76.306 is added to read as follows:

"§ 76.306 *Records of subscribers.* Every cable television system shall retain all records, in whatever form maintained, which it keeps of the subscribers, paying and non-paying, whom it serves during the last month of each quarter of operation. (See § 1.1101(f)). Every cable television system shall submit such records upon request by an authorized representative of the Commission, and shall retain such records for a period of three years."

F.C.C. 74R-75

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
DEEP SOUTH RADIO, INC., HATTIESBURG, MISS.	Docket No. 19889 File No. BPH-8376
VERNON C. FLOYD, RUBEN C. HUGHES, AND ROBERT L. FLOYD, D.B.A. CIRCUIT BROADCASTING CO., HATTIESBURG, MISS.	Docket No. 19890 File No. BPH-8443
JAMES A. MCCULLOUGH ENTERPRISES, HATTIESBURG, MISS.	Docket No. 19891 File No. BPH-8614
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 1, 1974; Released March 5, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Deep South Radio, Inc., one of the applicants, petitions for a sufficiency of funds issue against Circuit Broadcasting Company, one of its competitors for an FM station in Hattiesburg, Mississippi.[1] Deep South's petition is based on data in Circuit's application which was amended prior to the designation for hearing. Circuit's loan commitment, which petitioner argues has expired, has been renewed; Vernon C. Floyd's residence, which must be used as additional security for the loan to Circuit, is now free and clear, according to Floyd's latest balance sheet so that the problems envisioned by Deep South on this score do not exist; and the new bank loan commitment specifies only Floyd's home as required additional security, leaving no basis for petitioner's question on this respect of Circuit's financial proposal.

2. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by Deep South Radio, Inc., on January 4, 1974, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[1] The petition was filed January 4, 1974; Circuit filed an opposition January 16, 1974; and the Broadcast Bureau filed its opposition January 31, 1974.

F.C.C. 74-174

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DUBUQUE COMMUNICATIONS CORP. For a License To Cover the Construction Permit for Station KDUB-TV, Dubuque, Iowa	Docket No. 19339 File No. BLCT-2002

ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT; COMMISSIONER HOOKS CONCURRING IN THE RESULT.

1. We have before us: (1) an application for review of the Review Board's Decision (FCC 73R-410, released December 14, 1973, 28 RR2d 1669) granting the application of Dubuque Communications Corp. for a license to cover its outstanding construction permit, filed by the Chief, Broadcast Bureau; (2) the opposition and response of Dubuque Communications Corporation to said application for review; and (3) the comments of the Chief, Broadcast Bureau, on the foregoing opposition.

2. IT IS ORDERED, That the application for review filed January 14, 1973, by the Chief, Broadcast Bureau, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74R–73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
ERWIN O'CONNER TR/AS ERWIN O'CONNER BROADCASTING CO., DAYTON, TENN.	Docket No. 18547 File No. BPH–6408
NORMAN A. THOMAS, DAYTON, TENN.	Docket No. 18548
For Construction Permits	File No. BPH–6479

ORDER

(Adopted March 1, 1974; Released March 5, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. Before the Review Board for consideration is a motion for dismissal or withdrawal of petition for modification and enlargement of issues, filed January 16, 1974, by Norman A. Thomas (Thomas), seeking dismissal of its petition for modification and enlargement of issues, filed January 9, 1974, against Erwin O'Conner Broadcasting Co. (Erwin O'Conner); [1]

2. IT APPEARING, That in its motion to dismiss, Thomas states that the Administrative Law Judge, at a prehearing conference held on January 14, 1974, ruled that the financial issue specified by the Commission [2] encompasses all of the matters raised by Thomas in its petition to enlarge issues and that there is no basis for the requested modification and enlargement; and

3. IT FURTHER APPEARING, That the Review Board has examined the merits of the requested issues and agrees that modification and enlargement of the issues is unwarranted in light of the Presiding Judge's ruling of January 14, 1974;

4. IT IS ORDERED, That the motion for dismissal or withdrawal of petition for modification and enlargement of issues, filed January 16, 1974, by Norman A. Thomas IS GRANTED; and that the petition for modification and enlargement of issues, filed January 9, 1974, by Norman A. Thomas IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[1] Thomas requested that the Board modify the existing financial issue specified against O'Conner and specify an additional issue to inquire into the adequacy of O'Conner's proposed staff.

[2] FCC 73–1073, released October 23, 1973.

F.C.C. 73-1076

ADMINISTRATIVE ORDER NO. 1410.2

NOVEMBER 12, 1973.

SUBJECT: Federal Advisory Committees.

1. PURPOSE

The purpose of this Order is to set forth the Commission's policy, administrative guidelines, and management controls relative to advisory committees as required by the Federal Advisory Committee Act (Act), 86 Stat. 770, and pursuant to the joint Office of Management and Budget/Department of Justice Notices (38 F.R. 2306 and 2223, January 23, 1973).

2. BACKGROUND

Prior to January 5, 1973, the effective date of the Advisory Committee Act, advisory committees established by the Commission were governed by various Executive Orders. The Act requires each agency head to designate an Advisory Committee Management Officer, who shall exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees, and to establish uniform guidelines and management controls for advisory committees established by the agency. On December 13, 1972, the Commission designated the Executive Director as the Advisory Committee Management Officer (ACMO) for the Commission.

3. POLICY

Advisory committees shall be established or continued only if they are essential, are advisory only, their functions cannot be performed by commission staff or another existing committee, they are effectively fulfilling the purpose for which they were established, and in their creation, operation, and duration they are governed by the standards and guidelines set forth herein.

4. SCOPE

This Order applies to all advisory committees established by the Commission, including sub-committees and other subgroups thereof, or that part of an established organization utilized by the Commission as an advisory committee. Excluded from this Order is (a) any local civic group whose primary function is that of rendering a public service with respect to any Commission program, (b) any State or local committee or similar group established to advise State or local officials or agencies, and (c) any committee which is composed wholly of full-time officers or employees of the Federal Government.

5. DEFINITIONS

For the purposes of this Order:

a. The term Act means the Federal Advisory Committee Act.

b. The term committee shall mean advisory committee.

c. Advisory committee means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is established or utilized by the Commission in the interest of obtaining advice or recommendations for the Commission. In general, such bodies would have all or most of the following characteristics:

(1) Fixed membership, usually selected by a Federal official or determined on the basis of Federal law;

(2) Established by a Federal official or on the basis of Federal law; or, if not federally established, the initiative for its use as an advisory body for the Federal Government came from a Federal official rather than from a private group;

(3) A defined purpose of providing advice regarding a particular subject or particular subjects;

(4) An organizational structure (e.g., officers) and a staff;

(5) Regular or periodic meetings.

d. Utilization of a committee means the using by the Commission of all or a part of an already existing nongovernment organization to provide the FCC with advice.

e. A formal subgroup is one which independently contains most of the requirements of an advisory committee.

f. An informal subgroup is one possessing few of the characteristics of an advisory committee (e.g. during a particular meeting, an advisory committee may divide itself into several groups to discuss topics relating to the work of the committee).

g. The term ACMO means the Advisory Committee Management Officer.

6. RESPONSIBILITIES

a. *Commission.* The Commission will:

(1) Designate an Advisory Committee Management Officer (ACMO) for the Commission.

(2) Establish uniform administrative guidelines and management controls for advisory committees consistent with the Act and OMB directives.

(3) Establish, terminate, and renew committees based on recommendation of the Advisory Committee Management Officer.

b. *Advisory Committee Management Officer.* The ACMO will:

(1) Recommend revisions as necessary to the administrative guidelines and management controls for advisory committees established by the Commission.

(2) Advise the Commission and staff on questions concerning the application and administration of the Act.

(3) Control and supervise the establishment, procedures and accomplishments of the Advisory Committees established by the Commission.

(4) Recommend to the Commission the establishment or renewal of committees.

(5) Recommend to the Commission termination of Committees, based upon the annual review (see b(9)).

(6) Apply the provisions of the Public Information Act with respect to committee records, reports and other papers involved in the functioning of each committee.

(7) Assemble and maintain information on the nature, functions, operations, accomplishments, and budget of each committee during its existence, including records which fully disclose the disposition of private funds at the disposal of each committee, and make them available to the General Accounting Office for examination or audit upon request.

(8) Periodically review committee procedures for adequacy of performance under the Act.

(9) Conduct periodic and annual reviews of Committee activities and responsibilities to determine whether each Committee is properly carrying out its purposes, whether responsibilities assigned to it should be revised, whether it should be merged with other committees or whether it should be terminated.

(10) Submit, as part of the Commission's budget request, a summary for the expenses of Advisory Committees.

c. *Commissioners, Bureau and Office Chiefs.* Commissioners, and Bureau and Office Chiefs will:

(1) Recommend to the ACMO the establishment or renewal of an Advisory Committee and furnish to the ACMO information upon which a determination may be based to recommend to the Commission that the committee be established or renewed.

(2) After the Commission has officially established an Advisory Committee, the Commissioner or Bureau or Office Chief who has been given responsibility for the committee will conduct the operations of the committee in accordance with the provisions of this Order and assist the ACMO in carrying out his responsibility under the Act.

(3) Notify the ACMO in writing of the termination of a committee when that takes place prior to the Committee's official termination date.

(4) Select Commission officers or employees to serve as the Designated Federal Employee or as alternates for advisory committees for which they are responsible.

d. *Designated Federal Employee* (*See 6c(4) above*). This employee or an alternate:

(1) shall have sole authority for calling a committee meeting;

(2) must approve the agenda of all meetings which should be distributed to the members in advance of the meeting;

(3) must chair or attend all meetings of the committee or formal sub-groups;

(4) is authorized to adjourn any committee meeting whenever he determines adjournment to be in the public interest.

7. Procedures

a. *Establishment of Committees.* Whenever the Commission, a Commissioner, or a bureau of office chief seeks to establish an advisory committee, the following procedures shall apply:

(1) An agenda item recommending the establishment of the committee shall be prepared for the signature of a Commissioner or B/O Chief and the ACMO. The item shall describe (a) the nature, purpose and objectives of the proposed advisory committee, (b) the reasons why it is needed, including an explanation of why the functions of the proposed committee cannot be carried out by the staff or an existing committee, (c) the time needed to complete its purposes, (d) the amount of staff time and costs of providing services, (e) whether funding is to be by the Commission or from private sources.

(2) Upon approval by the Commission of the recommendation, the ACMO shall send a letter to the OMB Secretariat which shall include those matters described in 7a(1) (a) and (b).

(3) When the OMB Secretariat has advised FCC of its concurrence with the establishment of the committee, the ACMO shall (i) prepare a written certification to the effect that the creation of the committee is in the public interest, (ii) publish in the Federal Register the certification and a description of the nature and purpose of the committee at least 30 days prior to the filing of the committee's charter[1] and (iii) file the charter.

b. *Filing Committee Charters.*

(1) Each established or utilized committee shall furnish the ACMO with 4 copies of its charter. The ACMO shall retain one and transmit a copy to the Chairman, House Committee on Interstate and Foreign Commerce and Senate Committee on Commerce, and to the Library of Congress. Each charter shall contain the following information: (a) The committee's official designation; (b) the committee's objectives and the scope of its activity; (c) the period of time necessary for the committee to carry out its purposes; (d) the agency or official to whom the committee reports; (e) the agency responsible for providing the necessary support for the committee; (f) a description of the duties for which the committee is responsible, and if such duties are not solely advisory, a specification of the authority for such functions; (g) the estimated annual operating costs in dollars and manyears for such committee (government and private); (h) the estimated number and frequency of committee meetings; (i) the committee's termination date, if less than two years from the date of the committee's establishment; and (j) the date the charter is filed.

(2) Any formal subgroup (see 5e) which is an official component of a committee at the time the committee is established or renewed shall be included in the charter. The charter for any formal subgroup which is established at a time other than the time

[1] Requests for Federal Register publication for periods of time less than 30 days must be submitted with sound justification to the ACMO, who will, upon approval of the justification, request the OMB Secretariat to authorize a shorter time.

the committee is established shall be submitted when the formal subgroup is established.

(3) No advisory committee shall meet to conduct any business or take action until a charter is filed in accordance with 7b(1). Such charter shall be filed no earlier than 30 days after publication of the committee's certification in the Federal Register, except as provided in Note 1 under 7a.

c. *Membership.*

(1) The membership of each committee shall be fairly balanced in terms of the points of view represented and the committee's function. For instance, a committee may be limited to scientists when its function is solely to consider scientific questions; however, efforts should be made to include scientists representing different points of view and different types of employment (university, industry, etc.). If a committee is concerned with matters involving questions of social policy, representatives of the public interest should be included and consideration should be given to including a variety of economic and social groups and geographic areas.

(2) There shall be no discrimination in the selection of members on the basis of race, color, national origin, religion or sex.

(3) Appropriate safeguards shall be included in the organization of the committee to assure that the committee's advice and recommendations will not be inappropriately influenced by any special interest.

d. *Utilization* (*See 5d*). The provisions in 7 a–c are also applicable to committees which are utilized by the Commission.

8. Renewal and Termination

a. *Renewal.*

(1) If a committee has not completed its work and there is need to extend its existence, the FCC official responsible for it shall, not more than 60 days before scheduled date of termination, file with the ACMO a request that the committee should be renewed and four copies of a new charter, which charter shall be prepared in accordance with Section 7b(1). This request should contain the specific reasons for renewing the committee beyond its termination date.

(2) The ACMO, after the Commission has approved renewal, will publish a renewal notice in the Federal Register. This notice shall briefly cite the original notice of the committee's establishment, its renewal and duration. In addition he will transmit copies of the charter in accordance with Section 7b(1).

b. *Termination.* All committees shall terminate no later than 2 years after their charters have been filed unless renewed as provided in 8a.

c. *Subgroups.* Unless provided otherwise, the duration of a subgroup shall be the same as that of the parent committee.

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9. Committee Operations

a. *Meetings.* A series of detailed and specific requirements govern the operations of committees. These requirements are as follows:

(1) Calling of Meetings. No committee shall hold any meetings except at the call of or with the advance approval of a Designated Federal Employee (See 6d).

(2) Agenda. Each meeting of a committee shall be conducted in accordance with an agenda approved by the Designated Federal Employee. The agenda shall list the matters to be considered at the meeting and shall indicate whether any part of the meeting is concerned with matters which are within the exemptions of the Public Information Act, 5 USC 552(b) (See 9a(6)). Normally copies of the agenda should be distributed to the members of the committee prior to the date of the meeting.

(3) Attendance of Designated Federal Employee. No committee shall conduct any meeting in the absence of the designated Federal employee.

(4) Notice of Meetings:

(a) The designated Federal employee shall submit a notice of the meeting to the Minute and Rules Branch for publication in the Federal Register at least 11 days before the meeting. A copy shall be sent to the ACMO. The notice (Appendix A attached) should contain: (1) the name of the advisory committee; (2) the time and place of the meeting if open to public; (3) a summary of the agenda; (4) information as to whether the meeting is open to public; (5) the extent to which the public can participate by presenting oral or written statements.

Additional means informing the public of a prospective meeting, such as press releases, should be utilized to the extent practicable.

(b) A notice of a meeting can be omitted only on a determination by the Director, OMB, that such notice would be inconsistent with national security. Requests for such a determination must be submitted to OMB at least 30 days before such a meeting and shall be submitted through the ACMO.

(5) Public Participation. Each advisory committee meeting shall be open to the public except as described in (6)(a) below and shall be subject to the following:

(a) The meeting shall be held at a reasonable time and at a place that is accessible to the public.

(b) The meeting room shall be of reasonable size considering the size of the committee, expected public attendance and resources available to the committee and Commission.

(c) Any member of the public can file a written statement before or after the meeting.

(d) Interested persons may be permitted by the committee or its chairman to present oral statements to the extent time available for the meeting permits. Where a committee decides to permit oral presentations, such participation must be in accordance with procedures established by the committee and should require that persons must obtain advance approval for such oral presentations.

(e) Participation by members of the public in committee meetings or questioning of committee members shall not be permitted except in accordance with established committee procedures.

(6) Closed Meetings.

(a) Portions of or entire meetings may be closed to the public if the expressed purpose of the meeting (or portion thereof) will be to discuss subject matter which is within the following exemptions in the Public Information Act (5 USC 552(b)): (i) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy; (ii) related solely to the internal personnel rules and practices of an agency; (iii) specifically exempted from disclosure by statute; (iv) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (v) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (vi) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (vii) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency.

(b) A committee seeking to close a meeting (or portion thereof) must notify the ACMO in writing at least 30 days before the date of the meeting of its reasons for desiring to close the meeting. The ACMO will make a determination in writing and include a brief statement of the reasons for closing the meeting: *Provided that:* When a committee requests that a meeting (or portion thereof) shall be closed under the inter-agency or intra-agency memorandum exemption of the Public Information Act (See (v) above), the ACMO must determine that it is essential to close the meeting to protect the free exchange of internal views and to avoid undue interference with agency or committee operations. The legal basis for a closed meeting should be waived whenever practicable. After a closed meeting has been held, the ACMO may review the appropriateness of the determination to close the meeting and take whatever corrective action may be required.

(c) Any determination made by the ACMO to close a meeting shall be reviewed and approved by the General Counsel.

(d) When a meeting (or portion) is closed, members of the advisory committee shall not disclose the matters discussed except to other members of the advisory committee, the staff of the advisory committee or agency employees.

(7) Minutes. Detailed minutes shall be kept of each committee meeting including, to the extent practicable, meetings of formal and informal subgroups. The committee chairman may designate a member or a person who is not a member to take the minutes. The committee chairman, or if unable to attend, his delegate, shall certify to the accuracy of the minutes. At a minimum, the minutes shall contain: (a) the time and place of the meeting; (b) a list of committee members and staff and agency employees present; (c) a complete summary of matters discussed and conclusions

reached; (d) copies of all reports received, issued or approved by the committee; (e) a statement as to the extent to which the meeting was open to the public and the extent of public participation (including a list of members of the public who presented oral or written statements); (f) an estimate of the number of members of the public who attended the meeting.

(8) Transcripts. A transcript of meetings, if made, shall be available to any person at the cost of duplication.

(9) Presence of Designated Federal Employee. No advisory committee shall conduct a meeting in the absence of the Designated Federal Employee. (See 6d)

b. *Reports.* Eight copies of each final report adopted by a committee shall be submitted to the ACMO for transmission to the Library of Congress.

c. *Access to Records.*

(1) Each committee shall make its records, reports and other documents available in one location for public inspection and copying. Access should be restricted only to the exemption contained in 5 USC 552 (b). When the only basis for denying access to a document is exemption (5), the ACMO must make a positive determination that such a denial is essential to protect the free expression of internal views and to avoid interference with agency or advisory committee operations. This determination shall be reviewed and approved by the General Counsel.

(2) Where a meeting was closed, in part, access shall be permitted to records which relate directly to the open part of a meeting.

(3) Committee records shall be available for public inspection until the committee ceases to exist.

10. Administrative Remedies

a. *Records.* Any person whose request for access to committee records has been denied can request administrative review in accordance with § 0.461(d) (1) and (2) of the Commission's Rules.

b. *Other.* Any committee member, individual or organization aggrieved because of alleged non compliance with this directive should within 30 days of the alleged infraction report in writing to the ACMO details concerning the allegation. Any report of non compliance shall be reviewed and acted upon promptly, and written notice of the disposition of the matter shall be provided to the aggrieved person or persons by the ACMO.

11. Administrative Requirements

a. Support services include such matters as staff, quarters, supplies, funds (including funds for publication of reports where appropriate). Each bureau or office having responsibility for a committee shall provide the necessary support services to the committee, except as provided in 11b below. It shall include in its budget submission a separate item for operation of committees.

b. Private Funds Permitted. A committee may deem it necessary to finance the supporting services, in whole or in part, through private funds. An agenda item should be prepared for the signature of the Commissioner, Bureau or Office Chief responsible for the committee and the ACMO. It should include: (1) the reasons for requesting private funding; (2) the amount of money to be raised; (3) the manner in which the solicitation is to be made to avoid undue influence; (4) the proposed budget; and (5) a statement that an ACMO approved accounting system will be used.

12. Financial Records

Each committee which receives funds from private sources shall:

a. Describe and submit to the ACMO the safeguards which have been provided in the solicitation of funds against undue influence by any special interest.

b. Submit annually to the ACMO a proposed budget for the private funds to be used in the operation of the committee.

c. Submit to the ACMO for approval a system for maintaining financial records which will fully disclose the source and amount of receipts and disposition of funds obtained from these private sources.

d. Upon approval, maintain the accounting records on a current basis.

e. Submit to the ACMO quarterly and annual financial reports which fully disclose the disposition of funds received from private sources.

f. Provide the data required for an annual audit to be conducted by the FCC or an FCC designated auditor.

13. Reports

a. *Commissioners, and Bureau and Office Chiefs.* Each Commissioner or Bureau or Office Chief responsible for a committee will submit to the ACMO by January 5 of each year a report containing the following information:

(1) Name of committee.

(2) Title and date of reports submitted during preceding calendar year.

(3) Actual dates of all meetings and summary total of times met during preceding calendar year.

(4) Changes in membership during preceding calendar year, including name, address and occupations of new members.

(5) Estimated total aggregate annual cost to U.S.

(6) Estimated annual man-years of staff support for the committee.

(7) Name, address, and telephone number of person most familiar with the activities of the committee.

(8) If any or all meetings of the committee during the preceding year were closed to the public, attach to this report a summary of the activities of the committee which is informative and consistent with the Public Information Act.

(9) If any information is excluded from this report for reasons of national security, a statement, outlining reasons, should be included.

b. *ACMO.* The ACMO by February 1 of each year will submit to OMB an annual review of all advisory committees chartered by the FCC.

c. *Committees.* Committees receiving funds from private sources will submit to the ACMO the reports required in 12 above.

14. EFFECTIVE DATE

This Administrative Order is effective November 12, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX A

XYZ COMMITTEE

Notice of Meeting

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the XYZ Committee on June 12, 1973 to be held in Room 1001, 103 Sample Street, N.W. Washington, D.C.

The principal purposes of the meeting will be to review and discuss sampling criteria to be used in monitoring the usage of the radio spectrum developed and proposed by members of the working groups of the Committee.

Any member of the public may attend or may file a written statement with the committee either before or after the meeting. Any member of the public wishing to make an oral statement must consult with the committee prior to the meeting. Inquiries may be directed to Mr. A. B. Candy, Room 2088, 103 Sample Street, N.W. Washington, D.C. 20288—telephone 703–618–2345.

Dated:

F.C.C. 74-184

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATION (MARION, OHIO)	Docket No. 19837 RM-2099

REPORT AND ORDER

(Adopted February 21, 1974; Released February 22, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has before it the Notice of Proposed Rule Making adopted October 3, 1973 (FCC 73-1029, 38 Fed. Reg. 28574) proposing the amendment of Section 73.202(b) of the Rules, the FM Table of Assignments. The rule making was instituted on the basis of a petition filed by Scantland Broadcasting Company for a second FM assignment to Marion, Ohio. There were no oppositions to the proposal. Supporting comments were filed by petitioner.

2. Marion is a city of 38,646 population [1], and the seat of Marion County, population 64,724. It is located 40 miles north of Columbus, Ohio. There are two broadcast stations in Marion: WMRN, a Class IV AM station and WMRN-FM, a Class B FM station operating on Channel 295.

3. Petitioner states that Marion and Marion County have shown continued growth over the years: 1970 populations represent an increase of 7.5% for Marion County and 4.2% for the city of Marion over the 1960 Census figures. It adds that Marion is a large industrial center producing a wide variety of manufactured goods, which in 1969 employed 10,546 persons (over one-third of Marion's work force). It points out that agriculture is the second leading source of income in Marion County, the total cash receipts from all forms of farming having reached $16.2 million in 1970. Petitioner states that Marion currently has only one AM (Class IV) and one FM station (Channel 295), both under common ownership, and notes that there are no other stations in the immediate vicinity surrounding Marion, the closest broadcast stations being located at Bucyrus, Ohio, 17 miles distant, and of that city's two stations, only the FM station is audible in Marion. It also points out that a second FM channel to a city the size of Marion is called for by the Commission's FM Assignment Policy. Petitioner contends that a competing voice will not only provide an additional forum for news, public affairs and sports, but will provide an additional local mode of entertainment. It expresses an intent to apply for

[1] All population figures cited are from the 1970 U.S. Census unless otherwise stated.

a radio facility to operate on Channel 232A if it is assigned to Marion Ohio, and to promptly build such a facility in the event it is issued a construction permit.

4. The preclusion study shows that the proposed assignment would foreclose future assignment only on Channel 232A in a very limited area west of Marion. Although there are several communities located in or near this preclusion area, the largest community with a population of 867 persons does not appear large enough to warrant an assignment. As to intermixture of a Class A with a Class B channel at Marion, petitioner states, in his supporting comments, that he would prefer to build and operate a Class B facility but was unable to find a channel which would meet all of the Commission's separation requirements.

5. Although the requested assignment would intermix a Class A with a Class B channel the petitioner has expressed his conviction that a new Class A FM station can exist and prosper in the Marion, Ohio market place. In some circumstances we are hesitant to intermix channels; in others we have done so. Under our assignment criteria, Marion has a population the size of which would warrant its being assigned a second FM channel. Further, since the preclusionary effect of the proposed assignment would occur on only one channel in a very limited area, it would result in the efficient use of FM frequencies. After consideration of the pertinent facts in this proceeding, we are of the view that the subject proposal has merit and that its adoption would serve the public interest.

6. Authority for the action taken herein is contained in Sections 4 (i), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended.

7. Accordingly, IT IS ORDERED, that effective April 8, 1974, the Table of FM Assignments (Section 73.202(b)) IS AMENDED with respect to the city listed below as follows:

City:	*Channel No.*
Marion, Ohio	232A, 295

8. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–176

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 2, GOVERNING FREQUENCY ALLOCATIONS, PART 21 OF THE COMMISSION'S RULES, GOVERNING THE DOMESTIC PUBLIC LAND MOBILE RADIO SERVICES, AND PART 81 OF THE COMMISSION'S RULES, GOVERNING STATIONS ON LAND IN THE MARITIME SERVICES, TO ALLOCATE TO THE LATTER TWO SERVICES CERTAIN FREQUENCIES IN THE 76- TO 108-MHz BAND FOR FIXED RELAY AND CONTROL OPERATIONS IN THE STATE OF HAWAII	Docket No. 19943 RM–1894

NOTICE OF PROPOSED RULEMAKING

(Adopted February 21, 1974; Released February 26, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. Radiocall, Inc. a radio common carrier providing service in Hawaii, has requested changes in Sections 21.501(f) and 81.141 of the Rules to make available for use by licensees and applicants in the Domestic Public Land Mobile Radio Service and licensees and applicants for public coast facilities, frequencies in the 76–108 MHz band for fixed relay and control operations in Hawaii. The table of allocations in Part 2 of the Rules would correspondingly have to be amended.

2. The frequency band in question (76–108 MHz) is allocated nationally to television broadcasting (76–88 MHz) and FM broadcasting (88–108 MHz) with the exception of Hawaii where, pursuant to NG footnote 21, frequency bands 76–88 MHz and 98–108 MHz are allocated exclusively to fixed service use by common carrier fixed stations for inter-island communications only. Broadcast television on channels 5 (76–82 MHz) and 6 (82–88 MHz) is specifically prohibited in Hawaii pursuant to Rule Section 73.603(b), and correspondingly, FM broadcast in the band 98–108 MHz is similarly prohibited in Hawaii pursuant to Rule Section 73.204(d). Bands 76–88 MHz and 98–108 MHz are currently available only in the Common Carrier Rural Radio Service for inter-office stations. They are currently used in the state of Hawaii solely by the Hawaiian Telephone Company.

3. Currently authorized operations of Radiocall consist of four Domestic Public Land Mobile Radio Service stations and two VHF public coast stations. The operations of Radiocall are spread throughout Hawaii and, according to Radiocall, in order to be operated eco-

nomically must be controlled from a central location which happens to be Honolulu. Radiocall states that it has been unable to obtain appropriate control and repeater facilities and therefore has been handicapped in two respects: it has not been able to implement all of the authorizations granted to it by the Commission, even though the need for the pertinent facilities is clearly present; it has not been able to expand its facilities to meet the additional need which has been established and which could be met by common carriers.

4. In support of its request, Radiocall submits that frequencies currently allocated under Parts 21 and 81 of the Rules for control and repeater type communications are either unavailable or are unacceptable due to propagation problems; that at the present time there are no available wirelines at its proposed transmitter sites; and that it would be uneconomical to construct the wirelines required for the needed control and repeater functions.

5. Additionally, while other frequency bands are available for control and repeater operations (i.e. 72–76 MHz, 952–960 MHz, and 2110–2200 MHz), reasons for their unavailability have been presented by Radiocall. Operation involving the band 72–76 MHz is not possible, it says, because of the high probability of causing disruptive interference to the reception of TV channel 4 in Honolulu. While Radiocall has authority to operate a control and repeater link in the 952–960 MHz band, it contends it has been unable to obtain reliable performance due to propagation losses associated with the circuit which are directly related both to the frequency band and the distances involved. Use of frequencies at the 2100 MHz portion of the spectrum are not suitable, according to Radiocall, for three reasons: cost of equipment would be prohibitively high; operationally, use of wideband equipment for the comparatively small number of channels required would be wasteful of spectrum; and due to topographical factors, the frequencies could not be used without repeater stations.

6. Oppositions to Radiocall's petition were filed by the Hawaiian Telephone Company (Hawaiian) and Western Telestation, Inc. (Western). Hawaiian opposes Radiocall's petition on the grounds that Radiocall has not established conclusively that wireline control facilities are not available at the sites pertinent to Radiocall's operations; that Radiocall has not demonstrated the unavailability of other frequencies which would suffice; and that Radiocall has not demonstrated technically that its requirements could be accomplished using the 76–108 MHz band, due to an inaccurate portrayal of Hawaiian's operation within the band.

7. Western's argument in opposition to Radiocall's petition stems from an anticipated vacating of the 76–108 MHz band by Hawaiian which would result in enough spectrum for at least two television channels, both then being available for assignment within Hawaii. Western's main thrust is that the possibility for such future television service should not be foreclosed; hence Radiocall's petition should be denied.

8. Radiocall, in responding to Hawaiian's opposition, asserted the following: that circuits for wireline control at the sites of proposed operations are not available and while Hawaiian could provide such

circuits, it would only do so if Radiocall bore the construction costs associated with the projects; that such costs would be prohibitively expensive so as to preclude Radiocall from utilizing wireline control for its facilities; and that control operation utilizing other frequency bands cannot be employed, for reasons clearly stated in the petition.

9. Radiocall challenges Western's opposition on the grounds that while Western expects Hawaiian to vacate the 76–108 MHz band shortly, Western does not supply facts which substantiate this contention. Radiocall further asserts that additional TV requirements in Hawaii could be satisfied by assignments in the UHF–TV band, which would not require any rule changes, and points out that existing UHF channels in Hawaii have remained vacant until now.

10. In consideration of the foregoing, the Commission concludes that Radiocall's proposal is reasonable, but that its request for spectrum space is in excess of that required to accomplish its immediate objectives. Radiocall requests reallocation and access to 32 MHz of spectrum, while it appears the requirement can be satisfied in a fraction of that amount. Therefore, we are proposing to grant access at this time to a portion of the 88–108 MHz band. Specifically, we propose to permit access to the 107.89–108.0 MHz portion only; to set forth a specific channeling plan for the portion; and to set forth technical parameters for use of the frequencies.

11. The proposed modifications to Parts 2, 21 and 81 of the Rules, are set forth in the Appendix, and are issued pursuant to the authority in Sections 4(i) and 303 of the Communication Act of 1934, as amended.

12. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before April 8, 1974, and reply comments on or before April 17, 1974. All relevant and timely comments and reply comments will be considered by the Commission before final action in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to specific comments invited by this Notice.

13. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements, briefs, or comments filed shall be furnished to the Commission. Responses will be available for public inspection during regular business hours in the Commission's Docket Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

I. In Part 2, Section 2.106 is amended by revising footnote NG 21 to the Table of Frequency Allocations to read as follows:

"NG 21 In Hawaii the frequency bands 76–88 MHz and 98–108 MHz are allocated exclusively to the fixed service for use by common carrier inter-island use only, with the exception of the frequency band 107.89–108.0 MHz which is

available on a shared basis for control and repeater stations in the domestic public and maritime radio services only."

II. Part 21 of the Rules is amended as follows:

"1. Section 21.501(f) is amended by adding the band 107–108 MHz to the list of frequencies which are available for assignment to control and repeater stations functioning in conjunction with the Domestic Public Land Mobile Radio Service.

"§ 21.501 FREQUENCIES.

* * * * * * *

"(f) The frequencies listed in this paragraph are available for assignment to control and repeater stations functioning in conjunction with the Domestic Public Land Mobile Radio Service, on a shared basis with certain other radio services. A repeater station normally will not be authorized unless the land mobile radio system with which it is associated is continuously open for public correspondence and the emission of the repeater station are under the operational surveillance of the land mobile system's operating personnel.

"(1) 72–76 MHz Band [1]

"MHz	MHz	MHz	MHz
"72.02	72.42	72.82	
72.04		72.84	75.62
72.06	72.46	72.86	75.64
72.08		72.88	75.66
72.10	72.50	72.90	75.68
72.12		72.92	75.70
72.14	72.54	72.94	75.72
72.16		72.96	75.74
72.18	72.58	72.98	75.76
72.20		73.42	75.78
72.22	72.62		75.80
72.24	72.64	75.46	75.82
72.26	72.66		75.84
72.28	72.68	75.50	75.86
72.30	72.70		75.88
72.32	72.72	75.54	75.90
72.34	72.74		75.92
72.36	72.76	75.58	75.94
72.38	72.78		75.96
72.40	72.80		75.98

"(2) 107–108 MHz Band [2]

"MHz
"107.900
107.920
107.940
107.960
107.980

"[1] Assignments made to stations on frequencies in this band are subject to the condition that no harmful interference will be caused to operational fixed stations or reception of television stations on channels 4 or 5. (See § 2.103.) Existing stations authorized in the 73- to 74.6-MHz band as of Dec. 1, 1961, may continue to operate, are not required to afford protection to the radio astronomy service, and must comply with the following technical specifications:

Frequency Tolerance: 0.005 percent.
Frequency Deviation: ±15 kHz.
Authorized Bandwidth: 40 kHz.
Modulation Limiter: Required of transmitter authorized or installed after July 1, 1950.
Audio Low Pass Filter: Not required.

"[2] In Hawaii only, these frequencies are available for assignment to control and repeater stations functioning in conjunction with the Domestic Public Land Mobile Radio Service on a shared coordinated basis with stations in the Maritime Mobile Service. Operations on these frequencies using frequency modulated or phase modulated emissions shall comply with the following technical specifications:

Frequency tolerance: 0.0005 percent.
Frequency deviation: ±15 kHz.
Authorized Bandwidth: 20 kHz."

"2. In Section 21.507(b) of the Rules, footnote 2 is amended by adding the band 107–108 MHz.

"§ 21.507 BANDWIDTH AND EMISSION LIMITATIONS.

* * * * * * *

"(b) The maximum authorized bandwidth of emission and, for the cases of frequency or phase modulated emissions, the maximum authorized frequency deviation shall be as follows:

"Type of emission	Authorized bandwidth (kHz)	Frequency deviation (kHz)	Authorized bandwidth (kHz)	Frequency deviation (kHz)	Authorized bandwidth (kHz)	Frequency deviation (kHz)
"A1	1		1		1	
A2	3		3		3	
A3	8		8		8	
F1	3		3		3	
F2	15		15		15	
F3	20	5	[2] 40	[2] 15	[1] 20	[1] 5

"[1] In the frequency band 450 to 470 MHz, radio facilities using frequency modulated or phase modulated emission, authorized prior to June 1, 1968, will continue to be authorized with bandwidth of 40 kHz until Nov. 1, 1971, provided that the frequency deviation is reduced to 5 kHz by June 1, 1968.

"[2] In the frequency bands 72.0–73.0, 75.4–76.0, and 107–108 MHz, radio facilities using frequency modulated or phase modulated emission will be authorized with maximum bandwidth of 20 kHz and maximum frequency deviation of 5 kHz. Radio facilities which were authorized for operation on Dec. 1, 1961, in the frequency band 73.0–74.6 MHz may continue to be authorized without change and with bandwidth of 40 kHz and frequency deviation of 15 kHz. New or modified facilities in the frequency band 73.0–74.6 MHz will not be authorized."

* * * * * * * *

III. Part 81, of the Rules is amended as follows:

"1. In Section 81.132 paragraph (a), subparagraph (4) is amended by adding the band 107.890 to 108.000 MHz to the list or operational fixed stations.

"§ 81.132 AUTHORIZED CLASSES OF EMISSION.

"(a) Unless otherwise specified in the station license or in this part, stations are authorized to employ classes of emission as follows:

* * * * * * *

"(4) Operational fixed stations:

"72 to 76 MHz	A1, A2, A3, F1, F2, and F3.
107.890 to 108.000 MHz	F1, F2, and F3.

* * * * * * *

"2. Section 81.141(a) is amended by adding the frequency band 107.890–108.000 to the table.

"§ 81.141 MICROWAVE TECHNICAL STANDARDS.

* * * * * * *

"Frequency band (MHz)	Power (watts) [1]	Tolerance (percent)	Bandwidth [2]	Beam-width [3] (degrees)
"107.890 to 108.000	100	0.0005	20 kHz	20"

* * * * * * *

"3. Section 81.602 is amended by including the band 107.890–108.000 MHz in the eligibility requirements.

"§ 81.602 ELIGIBILITY REQUIREMENTS.

"An applicant for an operational fixed station using frequencies in the 72–76 MHz and 107.890–108.000 MHz bands must submit the following showings.

"(a) That he is the licensee of a coast station;

"(b) The specific need for a station; and

"(c) That other telecommunications facilities either are not available or will not provide effective results.

"4. Section 81.603 is amended by adding the band (107–108 MHz) and geographical limitations to the list of frequencies available for operational fixed stations.

"§ 81.603 OPERATIONAL FIXED FREQUENCIES IN THE BANDS 72–76 MHz AND 107–108 MHz.

"(a) The following frequencies listed in the bands below may be assigned to operational fixed stations:

"1) 72–76 MHz Band

"MHz	MHz	MHz	MHz
"72.02 [1]	72.36 [1]	72.80	75.66
72.04 [1]	72.38 [1]	72.82	75.68
72.06 [1]	72.40 [1]	72.84	75.70
72.08 [1]	72.42	72.86	75.72
72.10 [1]	72.46	72.88	75.74
72.12 [1]	72.50	72.90	75.76
72.14 [1]	72.54	72.92	75.78
72.16 [1]	72.58	72.94	75.80
72.18 [1]	72.62	72.96	75.82
72.20 [1]	72.64	72.98	75.84
72.22 [1]	72.66	75.42	75.86
72.24 [1]	72.68	75.46	75.88
72.26 [1]	72.70	75.50	75.90
72.28 [1]	72.72	75.54	75.92
72.30 [1]	72.74	75.58	75.94
72.32 [1]	72.76	75.62	75.96
72.34 [1]	72.78	75.64	75.98

"2) 107–108 MHz Band

"MHz
"107.900 [2]
107.920 [2]
107.940 [2]
107.960 [2]
107.980 [2]

[1] These frequencies are available on a shared basis with the Manufacturers Radio Service.
[2] In Hawaii only, this frequency is available for assignment on a shared coordinated basis with stations in the Domestic Public Land Mobile Service."

* * * * * * *

F.C.C. 73-1264

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GOODSON-TODMAN BROADCASTING, INC., PASADENA, CALIF.	Docket No. 15754 File No. BP-16159
ORANGE RADIO, INC., FULLERTON, CALIF.	Docket No. 15755 File No. BP-16160
PACIFIC FINE MUSIC, INC., WHITTIER, CALIF.	Docket No. 15756 File No. 16161
ROBERT S. MORTON, ARTHUR HANISCH, MACDONALD CAREY, BEN F. SMITH, DONALD C. McBAIN, ROBERT BRECKNER, LOUIS R. VINCENTI, ROBERT C. MARDIAN, JAMES B. BOYLE, ROBERT M. VAILLANCOURT AND EDWIN EARL, D.B.A. CROWN CITY BROADCASTING CO., PASADENA, CALIF.	Docket No. 15762 File No. BP-16168
VOICE IN PASADENA, INC., PASADENA, CALIF.	Docket No. 15764 File No. BP-16172
WESTERN BROADCASTING CORP., PASADENA, CALIF.	Docket No. 15765 File No. BP-16173
PASADENA BROADCASTING CO., PASADENA, CALIF.	Docket No. 15766 File No. BP-16174
For Construction Permits	

APPEARANCES

Reed Miller (Arnold & Porter) on behalf of Goodson-Todman Broadcasting, Inc.; *Edward P. Morgan* (Welch & Morgan) on behalf of Orange Radio, Inc.; *Frank U. Fletcher* (Fletcher, Heald, Rowell, Kenehan & Hildreth) on behalf of Pacific Fine Music Inc.; *Michael H. Bader* (Haley, Bader & Potts) on behalf of Crown City Broadcasting Co.; *Robert M. Booth, Jr.*, (Booth & Freret) on behalf of Voice In Pasadena, Inc.; *Joseph M. Kittner* (McKenna & Wilkinson) on behalf of Western Broadcasting Corporation; *L. Adrian Roberts* (Dow, Lohnes & Albertson) on behalf of Pasadena Broadcasting Company; *Norman E. Jorgensen* (Jorgensen & Resnick) on behalf of Donnelly C. Reeves; and *Walter C. Miller* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted December 5, 1973; Released December 10, 1973)

CHAIRMAN BURCH FOR THE COMMISSION: COMMISSIONER ROBERT E. LEE DISSENTING AND ISSUING A STATEMENT; COMMISSIONER H. REX LEE DISSENTING; COMMISSIONER JOHNSON CONCURRING.

BACKGROUND

1. This proceeding involves several mutually exclusive applications for a standard broadcast facility on the frequency 1110 kHz in the Los Angeles-Long Beach Urbanized Area. A station to serve this area was previously authorized in 1941 to operate directionally on 1110 kHz with a power of 10 kw, unlimited time, and in November, 1958, a construction permit was issued which authorized a daytime power increase to 50 kw with a change in its directional antenna system. The frequency became available as a result of our refusal to renew the license of Eleven Ten Broadcasting Corporation, the licensee of Station KRLA at Pasadena, California. *Eleven Ten Broadcasting Corp.*, 32 FCC 706, reconsideration denied 33 FCC 92 (1962), affirmed *sub nom*, *Immaculate Conception Church of Los Angeles, et al.* v. F.C.C., 116 U.S. App. D.C. 73, 320 F. 2d 795 (1963), *cert. denied* 375 U.S. 904. Thereafter, the Commission granted Oak Knoll Broadcasting Corp.[1] interim authority to utilize the existing KRLA facilities until "3:00 a.m. local time, on the day following release of a Decision in the pending proceeding for regular authorization on the frequency, or at such other time as the said Decision may specify." *Oak Knoll Broadcasting Corp.*, FCC 64–665, 2 RR 2d 1011, 1029, released July 20, 1964. The Commission also invited the filing of new applications for use of the frequency of the deleted facility (Public Notice, FCC 64–142, released February 20, 1964), lifted the then existing AM "freeze", accepted applications for the station (FCC 64–743, released July 29, 1964) and designated a number of the applications for hearing (FCC 64–1195, 30 FR 168 published January 7, 1965).[2]

2. Only 10 of the applicants which initially had filed for the facility went through the hearing and intermediate appeal to the Review Board. Applications for review of the Review Board Decision were filed by nine of the applicants, of which one was dismissed at its request [3] and two others were denied.[4] This Decision, therefore, relates

[1] Oak Knoll is a non-profit organization which donates a percentage of the profits derived from its interim operation to educational television in the southern California area.

[2] The issues designated by the Commission and by the Review Board are set forth in Appendix IV to the Review Board Decision, 29 FCC 2d 533 at 602–604.

[3] California Regional Broadcasting Corp., one of the applicants for a facility at Pasadena, California, petitioned the Commission for dismissal of its application. By Order, FCC 72–847, released October 3, 1972, the petition was granted.

[4] Charles W. Jobbins applied for a 1 kw, daytime only facility at Costa Mesa-Newport Beach, California (Docket No. 15752). C.D. Funk and George A. Baron, a partnership doing business as Topanga Malibu Broadcasting Company, applied for a 500 watt, unlimited time station at Topanga, California (Docket No. 15758). The application for review of each was denied without specifying reasons for the action taken pursuant to Section 1.115(g) of the Commission's Rules in our Memorandum Opinion and Order, 39 FCC 2d 597, released February 15, 1973.

to the applications of the remaining seven applicants for facilities on the 1110 kHz frequency set forth in the caption above.[5]

3. Four of the applicants, Goodson-Todman, Crown City Broadcasting, Voice In Pasadena, and Pasadena Broadcasting, propose to utilize the present antenna site of KRLA for their operations. With respect to matters common to the four applicants, they will be referred to herein as the Joint Siters. Western [6] also proposes to locate in Pasadena but at a site approximately three miles from the KRLA site. Orange has specified Fullerton as its community and proposes an antenna site approximately four and one-half miles north of the city limits of that community. The community specified by Pacific Fine Music is Whittier and it proposes a transmitter site about six miles northeast of the city limits of its specified community. All propose to operate full time with a power of 50 kw day and 10 kw night. In an Initial Decision, 29 FCC 2d 609, released April 2, 1969, the Administrative Law Judge (ALJ) recommended a grant to Voice In Pasadena. The Review Board, in a decision released May 26, 1971 (29 FCC 2d 533) disqualified all of the applicants except Orange on technical engineering grounds and denied such applications. With respect to the Orange application, it held that a grant could not be made without further hearing because serious question had been raised concerning the character qualifications of some of Orange's principals. It therefore severed the Orange application from the consolidated proceeding and, by a separate Memorandum Opinion and Order, 29 FCC 2d 849, released May 26, 1971 enlarged the issues and remanded the proceeding to the ALJ for further hearing and resolution of the added issues.[7]

4. Because of the importance and complexity of the policy, legal, and factual questions raised in the pleadings of the seven aforementioned parties and of the Broadcast Bureau, we granted review of the Review Board's disposition of the said applications and authorized oral argument.[8] Oral argument was heard by the Commission *en banc* on March 19 and 20, 1973.

PRELIMINARY OBSERVATIONS

5. This has indeed been an extremely close and troublesome case. Each of the proposals involves numerous technical problems which do not have easy solutions. The opinions of the communications engineers, who are experts in matters pertaining to the construction of broadcast facilities, are conflicting. In many respects the circumstances are unique

[5] The pleadings filed by the parties in connection with this review proceeding are set forth in footnote 1 to our Memorandum Opinion and Order, 39 FCC 2d 597, released February 15, 1973.

[6] A petition by Western to amend its application to reflect the divestiture by Richard A. Moore of his stock in the applicant corporation was granted by our Memorandum Opinion and Order 39 FCC 2d 595, released February 15, 1973.

[7] In its Memorandum Opinion and Order, the Board ordered that Hughes Tool Co., licensee of Station KLAS–TV on Channel 8 at Las Vegas, Nevada, be made a party to the remand proceeding. We upheld the Board's action in regard to Hughes Tool Co. in a Memorandum Opinion and Order, FCC 72–204, 33 FCC 2d 821, released March 3, 1972. However, Hughes filed a petition for reconsideration of that order and disposition of that petition will hereinafter be made in light of the action we are taking on Orange's application.

[8] 39 FCC 2d 597, released February 15, 1973. Donnelly C. Reeves, licensee of Station KPOP at Roseville, California (see par. 38, *infra*), was also authorized to present argument concerning the matter of objectionable nighttime interference which would be caused to the station by certain of the proposals under consideration. FCC 73–276, released March 9, 1973.

so that past precedent and policy have provided only limited guidance to the solution of the policy and other public interest issues presented herein. Therefore, we have had to weigh and evaluate the several, and frequently conflicting, legal, factual, technical, and policy questions presented in an effort to reach a determination which gives the greatest assurance of an operation which will best serve the public interest. In making that determination we have found the analyses of the ALJ and the Review Board and their discussions of the law and the facts, and of the policy matters to be considered of invaluable assistance. To the extent consistent with our decision herein, the findings and conclusions of the ALJ as modified by the Review Board as well as the approach taken by the Review Board in the resolution of the problems presented by the unique circumstances of this case are adopted. However, the ultimate responsibility for a final decision is ours and, for the reasons hereinafter set forth, we conclude that a grant of the Western Broadcasting Corporation application will best serve the public interest.

6. Before discussing our evaluation of the applicants and their proposals, we shall dispose of one preliminary matter. The suggestion has been made that the entire proceeding be remanded for further hearing in order to bring the record up to date and for certain other purposes. However, we believe that nothing of substance will be achieved by such a proceeding and that the resultant additional delay will be inconsistent with the public interest. At some point the administrative process must be brought to a conclusion and that point has been reached here. Considerable time, effort, and money have been expended by the applicants to locate suitable antenna sites and to obtain the advice and assistance of experts concerning the numerous technical problems presented. During the almost ten years that this case has been pending, a massive record has been compiled. Pleadings have been filed with, and oral argument presented to, both a panel of the Review Board and the Commission *en banc* so that all parties have had ample opportunity to express their views as to the facts and the law and to bring all relevant and material matters to the attention of the Commission. Decisions have been released by both the ALJ and the Review Board containing detailed discussions of the law and the facts and the contentions of the parties with respect thereto. At this stage of the proceeding, therefore, we believe that the public interest would be better served by the issuance of a final decision based on the evidence adduced pursuant to the designated issues rather than start the process anew with a reopened hearing to bring the record up to date.[9] Furthermore, in resolving the designated issues, we propose, except for amendments duly filed and accepted, to base our decision on the evidence adduced at the hearings and on the facts as they existed when the record was closed.

[9] A far different situation is here presented than in *WORZ, Inc.* v. *FCC*, 120 U.S. App. D.C. 191, 345 F. 2d 85 *cert. denied* 382 U.S. 889 (1965) where the Court directed a reopening of a comparative proceeding. In that case, the Court was concerned not only with the staleness of the record but with the "dubious circumstances of the case" and its "nagging uncertainty as to whether so vital a community facility as is involved here should not be exposed to what may possibly be wider interests than those represented by two applicants". Such concerns are not present in this case where there are no comparable "dubious circumstances" and sixteen applications were originally designated for hearing of which seven are still before us.

SECTION 307(b) CONSIDERATIONS [10]

7. Several of the applicants have challenged the approach taken by the Review Board in deciding this case. In its analysis of the issues, the Review Board advanced certain considerations which it deemed "fundamental" to the decisional process in this proceeding. They are as follows (29 FCC 2d at 539–541):

(a) Because of increased saturation of the AM spectrum, progressively more stringent technical standards, and international agreements, the flexibility of changing an existing AM assignment is limited and, consequently, the assignment is relatively fixed in location. The Review Board therefore concluded that we have here "a unique Section 307(b) proceeding" involving an old and relatively fixed assignment of this frequency in the southern California area, using high power;

(b) Section 307(b) does not require the Commission to reassign existing AM assignments in order to secure a more equitable distribution of radio services even though prior to effective regulation a large number of AM stations were established without regard to their geographic distribution. Rather, the Review Board held, Section 307(b) contemplates the preservation of existing service areas and places upon the Commission the duty to take the existing situation [11] into consideration when acting on requests for new or improved facilities. Based on the foregoing, the Board concluded that sound allocation policy requires that the old and relatively fixed assignment of the frequency under consideration in the southern California area "remain essentially in *status quo* absent counterproposals which would result in a better allocation or more efficient use"; and

(c) When a frequency assignment near a border with a neighboring country is vacated or deleted and not used, the neighboring country is entitled to notice of non-use and it may then acquire rights which would not exist if the frequency were used in accordance with its assignment. The Board's third conclusion, therefore, was that there are "unique public interest benefits to be derived from a proposal which would continue to accord utmost control and protection" to the preservation of the treaty rights of the United States with respect to this existing high power AM frequency assignment near the border of a neighboring country, particularly since non-use may result in the neighboring country acquiring rights to the use of the frequency.[12]

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[10] Section 307(b) of the Act provides in pertinent part as follows: "In considering applications for licenses, . . . the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[11] In our July 29, 1964 order (FCC 64–743) we noted that the applicants "propose the continuation of an operation in existence."

[12] In granting Oak Knoll the interim authority to operate with 50 kw day and 10 kw night, the Commission stated (2 RR 2d at 1016): "The most obvious benefit is that it will make use of a 50 kw assignment instead of leaving it fallow. It would accord utmost protection of the interests of the United States under international agreements by avoiding any possibility of controversy concerning the continued use of the frequency in the Southern California area."

8. We agree with the Review Board that this is a unique Section 307(b) situation and that the fundamental considerations enumerated by the Review Board are material and relevant to the disposition of the issues designated herein and to a determination of which applicant should be awarded a license for the 1110 kHz frequency. Therefore we start with the premise in this unique Section 307(b) situation that the frequency should be retained as a high power facility to serve the southern California area and in a manner which will best protect the rights of the United States under its international agreements. A broadcast facility in this area has been authorized on 1110 kHz since 1941 with 10 kw, unlimited time. In 1958, a construction permit was issued authorizing an increase of power daytime from 10 kw to 50 kw and the station has operated with such power ever since. At the present time KRLA serves over seven million people within its 0.5 mv/m contour daytime and over five million people within its interference free contour at night, based on the 1960 census records.[13] The area covered daytime includes 12,935 square miles, encompasses all of Los Angeles, and extends down to the Mexican border. At night, the interference free area consists of approximately 978 square miles which includes a substantial proportion of the area and population of the Los Angeles-Long Beach Urbanized Area. Thus, it is apparent that, although assigned to Pasadena, this high power station has been, in practical effect and for all intents and purposes, a southern California station and it must be regarded as such in the disposition of this case.

9. It is in the light of these basic considerations that we must evaluate the objections which have been interposed to the Review Board's treatment of those issues going to a determination of whether each of the proposals would realistically provide a local transmission service for its specified station location or a larger nearby community, and whether a choice may be and should be made under Section 307(b) of the Act among the specified communities. The Review Board took the position that under the unique circumstances of this case a resolution of these issues was unnecessary and it accorded no decisional weight to certain of the evidence adduced pursuant to these issues. We have considered the contentions advanced by each of the parties but we are not persuaded that reversible error was committed. While the issues appeared to be relevant at the time they were designated, it is now evident, in the light of the particular facts developed as a result of the extensive hearings conducted in this proceeding, that there are overriding public interest considerations which must be given dispositive weight.

10. In this proceeding we are concerned with the disposition of an existing high power facility which has long served a large number of communities in the southern California area,[14] and we have determined for the reasons hereinbefore set forth [15] that the public interest would be better served by its continuation as a wide area station. In

[13] Throughout this Decision, references to population figures are based on the 1960 census since the 1960 census figures were used at the hearing.

[14] Testimony of record indicates that there are eighty to ninety incorporated cities in this general area.

[15] See also paragraph 30 of the Review Board's decision (29 FCC 2d at 546).

these circumstances, our *Suburban Community Policy Statement*[16] which expressly relates to applications for new or improved standard broadcast facilities, has no application here. See *1400 Corp. (KBMI) et al.*, 4 FCC 2d 715 (1966). It is most unlikely that a station with a power of 50 kw day and 10 kw night would be authorized under present policy to serve Pasadena (pop. 116,407), Fullerton (pop. 56,180), or Whittier (pop. 33,663); all in the Los Angeles-Long Beach Urbanized Area (pop. 6,488,791) and in the very shadow of Los Angeles.[17] However, since we have under consideration the continuation of an existing facility which has been in operation for many years, an authorization is not precluded merely because a substantially larger community will also continue to receive service. It would be inconsistent to hold that the public interest would be better served by continuation of a high power wide area southern California service and then penalize the applicant for making a proposal which meets this public interest test.

11. For like reasons we conclude that no Section 307(b) choice may be made under the unique circumstances of this case among the communities of Pasadena, Fullerton, and Whittier. In his discussion of the 307(b) issue, the Administrative Law Judge commented upon the tremendous growth in the population of the communities in Los Angeles and Orange Counties, the fact that the needs and interests of the politically separate parts have become "so intertwined that one cannot be wholly isolated from the whole," and other evidence which led him to the "inevitable conclusion that the entire area which this major broadcast facility has served for almost 30 years and would continue to serve under all but two of the proposals [the low powered proposals] here involved, has now evolved into a major metropolis." He then held as follows (par. 488, 29 FCC 2d at 762): "The effect of this metropolitan development on the transmission service philosophy of virtually all existing standard broadcast stations within the area is established by the record and fully reflected in the foregoing findings of fact. Two low-powered stations do concentrate on providing a transmission service for the single political entity specified as the station location. Each of the others seeks to identify its transmission service with the entire metropolitan area or the portions thereof receiving a reception service rather than its specified community. And it would be wholly unrealistic to conclude, in the face of the evidence of record, that any one of the operations here proposed would not seek similar identification, including the Costa Mesa-Newport Beach applicant [one of the low-powered applicants]."

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[16] See *The Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190 (1965), where the Commission enunciated the policy that with respect to applications for new or improved standard broadcast facilities where the proposed 5 mv/m daytime contour would penetrate the geographic boundaries of a community over 50,000 population and twice the size of the specified community a presumption arises that the applicant realistically proposes to serve the larger community.

[17] The *Suburban Community Policy Statement* is based upon the premise that minimum or low power for suburban stations best serves the public interest and it therefore interdicts, with respect to new frequency assignments, the use of greater power than is necessary to serve the needs of a particular suburban community.

12. We agree with the ALJ's appraisal of the situation and his characterization of the facility under consideration as a "metropolitan area" service rather than one for a specified community [18]. Likewise, the Review Board although it did not reach the question of which community is preferable since it disqualified all of the applicants except Orange, nevertheless referred to this assignment as a southern California area station and commented upon the importance of preserving existing service areas. The Board also found that all of the high-power applicants proposed a wide area metropolitan type operation which would serve the interests of the listening audience not only of the particular community in which they are located but in the entire portion of the metropolitan areas.[19] (29 FCC 2d at 549). In the circumstances of this case, therefore, where a 50 kw authorization has provided wide area service for southern California since 1958, where the past operation has provided and the proposed operations contemplate a metropolitan area type service,[20] and the maximum separation between any of the sites proposed for the three specified communities is less than ten miles, the mere fact that a studio may be located in one community rather than another is not entitled to dispositive consideration. In view of the foregoing, the other reasons set forth by the Review Board concerning the fundamental and unique considerations which must be taken into account in the disposition of these applications, and our determination that continuation of this existing high-power frequency assignment with its wide area coverage is in the public interest, we conclude that each of the pending proposals will meet the fair and equitable distribution objectives of Section 307(b), and that there is no practical or realistic basis for specifying one community over the other as the preferred community.

[18] Nevertheless, the ALJ made findings and conclusions with respect to the *Suburban Community* issues and he made a Section 307(b) choice among the specified communities. Apparently he concluded that this approach was essential because of his view that an "assignment of a station to a single community rather than on a metropolitan area concept" is basic to the Commission's allocation policies and, where there is involved "a basic policy change,—the Hearing Examiner has no authority under which the 307(b) considerations relevant hereto could be resolved on the basis of a metropolitan area allocation" (29 FCC 2d at 763). We do not agree that a basic policy change is involved in our holding. Rather, for the reasons set forth herein and in the Review Board's decision, we believe that the peculiar facts and circumstances of this case call for the application of other policy and public interest considerations which are paramount. In this connection, we have examined our decision in *KEZY Radio, Inc.* (KEZY), 3 FCC 2d 407 (1966) but find substantial factual differences which make the case clearly inapplicable to the one under consideration.

[19] The following table indicates the percent of coverage which would be provided to the population of the Los Angeles-Long Beach Urbanized Area by each of the remaining applicants in this proceeding:

[In percent]

	2-mv/m daytime	Interference-free nighttime contour
Joint Siters	100	81
Orange	100	65
PFM	100	77.1
Western	100	84.2

[20] There is substantial evidence of record which we credit, to the effect that the Los Angeles and surrounding areas which encompass all three communities are homogeneous in character; that there are no unique or separate and distinct programming needs of one community as distinguished from the programming needs of the several other communities in the area, but rather that there are essentially area needs; and that the needs, tastes and desires of the residents of the specified communities are substantially similar to those of the central city-Los Angeles.

PROTECTION OF INTERESTS UNDER INTERNATIONAL AGREEMENTS

13. In authorizing an interim operation by Oak Knoll, we expressed as a public interest consideration the protection of United States' interests under international agreements by the avoidance of any controversy concerning the continued use of the frequency in the southern California area (2 RR 2d at 1016). Based at least in part on this statement, the Review Board enunciated as one of its "fundamental" conclusions the need to provide the "utmost control and protection" to the United States with respect to this frequency assignment by reason of its proximity to Mexico; and it gave weight to this factor in assessing the merits of the competing applications. We agree with the Board that protection of this country's rights under its international agreements is a public interest factor which must be accorded decisional significance but we disagree with the manner in which the Board treated the matter of protection in this case.

14. Considerable weight was given by the Review Board to the fact that one of the low-power applicants, Topanga Malibu Broadcasting Co., would not provide sufficient protection to the United States since its proposed 0.5 mv/m contour would fall 98 miles north of the Mexican border (29 FCC 2d at 542). However, the Board apparently did not consider as detracting from the merits of the Orange proposal the fact that its daytime contour would fall 50 miles short of the border even though the pertinent contours under the proposals of the Joint Siters, Western, and Pacific Fine Music would penetrate the border. We believe that cognizance must be taken of this difference in coverage in the area adjacent to the Mexican border between Orange and the other highpower applicants.[21]

ENGINEERING AND OTHER TECHNICAL ISSUES

15. Unquestionably, the resolution of those issues which relate to the technical and engineering problems presented by the applications under consideration are critical to the disposition of this case. Each and every proposal is faced with substantial technical difficulties which must be overcome and each is deficient in some respect. Thus our choice is not among applicants who meet all of our technical and engineering requirements but among applicants with a variety of shortcomings where there appears to be no reasonable likelihood that a proposal which does meet all of these requirements would be forthcoming if we opened the frequency to new applications. Therefore, our objective here must be to choose the proposal which holds out the greatest promise of overcoming any potential engineering difficulties of a serious nature, and which provides the greatest assurance of an efficient and effective use of the frequency.

16. As previously stated, the Review Board disqualified all of the applicants on engineering grounds except Orange. However, in making this determination, the Review Board took official notice of correspondence and other information concerning the various difficulties

[21] Thus, the rural areas within 50 miles of the border would receive no service from Orange but would be served by the other applicants so that no question could arise as to the continued utilization of the frequency by the United States right up to the border.

encountered by Oak Knoll Broadcasting, the interim operator, in its efforts to eliminate troublesome reradiation problems and to adjust its directional antenna array. This brings us to the question raised by several of the applicants of whether the Review Board improperly relied on extra-record material in reaching a decision and if so, what remedial action is required.

17. To the extent that the Board took notice of information in the Commission's files to demonstrate that the deficiencies of the KRLA site and the difficulties in adjusting and maintaining its nighttime directional array "have been of vital concern to the Commission, and that all of the high-power applicants here had notice of the importance of these critical issues" (29 FCC 2d at 548), no prejudicial error was committed. In previous orders adopted in connection with the disposition of this case we had occasion to discuss the engineering problems presented by the KRLA site. Thus, in our designation order we made express reference to the "KRLA difficulties experienced in adjusting and maintaining its present directional antenna system" and specifically mentioned the existence of man-made objects and terrain irregularities which may result in signal scatter and reradiation as well as other engineering problems presented by the proposals under consideration. Manifestly, the applicants were fully aware of our concern with the serious engineering deficiencies which were indicated by our preliminary examination of their applications. Also, extensive evidence was introduced at the hearing through the engineering consultants of the applicants concerning the difficulties encountered with the existing KRLA nighttime array [22] and the indications of possible interference to KFAB.[23] It should therefore have come as no surprise to any of the applicants that the Review Board attached considerable significance to the man-made objects and terrain irregularities which might be detrimental to an efficient operation and to the need for a solution of the problems presented. Undoubtedly the extensive engineering evidence adduced by each of the applicants was prompted by an awareness of the numerous technical obstacles to be overcome in order to demonstrate not only an acceptable proposal but one which would merit favorable consideration over those of the competing applicants.

18. We cannot, however, accept correspondence and other non-record material concerning the failure of the interim operator to solve its engineering problems, of which official notice was taken for the first time in the Board's decision, as providing any significant support for a conclusion that certain of the applicants for a permanent license will be unable to meet specific engineering requirements. Even assuming it were permissible to do so, we would not accept findings based on official notice of non-record material in so complex a case as this one without affording the affected parties an opportunity to adduce

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[22] See Initial Decision, pars. 255–260 (29 FCC 2d at 684–686) and Review Board Decision, pars. 39–42 (29 FCC 2d at 551–553).

[23] Station KFAB located at Omaha, Nebraska, is the dominant Class I–B station on the 1110 kHz frequency. Under Section 73.182(a)(1)(ii), a Class I–B station is entitled to protection against interference from co-channel stations nighttime "to the 500 uv/m 50 percent skywave contour" and daytime "to the 100 uv/m groundwave contour".

countervailing evidence.[24] Moreover, as heretofore stated, a massive amount of engineering evidence was adduced by the applicants on the subjects of detuning transmission power lines and other objects which may be potential reradiation sources, and of adjusting and maintaining directional antenna systems. The applicants also adduced evidence in support of their contentions that, despite the prolonged and at least partially unsuccessful efforts of Oak Knoll to solve problems at the existing site, they have the capabilities, both technical and financial, and the willingness to construct a facility which will have no significant technical deficiencies. In view of the foregoing, our decision as to whether the applicants have met their burden of demonstrating that they have the capability of overcoming any deficiencies in the existing operation or any potential difficulties indicated by their proposals cannot be predicated on Oak Knoll's technical or financial inability to do so, but must be based on the evidence of record in this adjudicatory proceeding. Consequently in our resolution of the issues going to the suitability of a particular site or the ability of an applicant to meet technical standards of the Commission, we shall consider only record material and shall place no reliance on official notice of correspondence in Commission files or on other non-record material concerning the lack of success by Oak Knoll to solve the engineering problems which have been encountered.[25] We believe that this procedure meets the requirements of administrative due process and removes any possible prejudice to an applicant by taking official notice of matters to which the applicant has had no adequate opportunity to respond.

SUITABILITY OF TRANSMITTER SITE AND ADJUSTMENT AND MAINTENANCE OF DIRECTIONAL ANTENNA SYSTEMS

19. Placing a high power standard broadcast transmitter in reasonable proximity to a center of great population density is fraught with difficulty because installations which are essential to provide electrical and other services to a megalopolis may have an adverse effect upon radio transmission. That is the situation which faces the applicants here. In order to protect KFAB, the dominant Class I–B station on this channel, in accordance with our rules, the antenna system of each proposal must include a highly directional array for use at night. Since power lines and their supporting metal poles, derricks, and other metallic structures located in radiated fields are capable of reradiating energy which could distort the desired radiation pattern of the directional array, the area in the vicinity of a proposed transmitter site must be scrutinized to determine whether or to what extent conditions exist which are likely to cause such distortion. In this connection, it should be noted that the field strength of the reradiated field at a particular point depends, besides the electrical height of the reradiator,

[24] But see Section 556(e) of the Administrative Procedure Act, which provides in part that: "[W]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." This provision has been incorporated into the Commission's Rules as Section 1.203. See also: *Deep South Broadcasting Co.* v. *F.C.C.*, 120 U.S. App. D.C. 365, 347 F. 2d 459 (1965); *Dayco Corporation* v. *F.T.C.*, 362 F. 2d 180, 187 (6th Cir., 1966).

[25] Consistent with this ruling, we shall not rely on extra-record material in the resolution of any of the issues designated for hearing in this adjudicatory proceeding.

on the magnitude of the ambient field in which the reradiating structure is immersed and its distance from that point. Thus, assuming similar distances from the reradiator to the antenna array, a reradiating structure located between the 2.0 and 3.0 v/m field strength contours could be expected to cause more reradiation than a structure between the 1.0 and 2.0 v/m contours; and within each contour, the closer the structure is to the array, the greater the reradiation is likely to be. Although some technical deficiencies exist as to each of the proposals, we find none of them to be disqualifying. An evaluation of the sites [26] and the directional antenna arrays proposed by the applicants is therefore necessary for the purpose of determining whether the reradiation problems are of manageable proportions, whether the necessary adjustment and maintenance of the directional antenna arrays will be achieved, and which one of the proposals should be preferred insofar as matters of site location and adjustment and maintenance of the directional antenna array are concerned.

20. The Joint Siters propose to use the site presently occupied by KRLA but with new and improved equipment. However, conditions exist in this area which are likely to cause serious and substantial problems. A number of high voltage power transmission lines are located near the KRLA site and, within nighttime ambient fields ranging from 0.5 v/m to 6.0 v/m, there are 131 supporting steel towers some of which are 130 feet high. Of particular significance is the fact that of these transmission line towers, 11 are located within the 2.0–6.0 v/m contours [27] and are only 800 to 2200 feet from the KRLA antenna array. In addition 36 towers are within the 1.0–2.0 v/m contours and at distances from the array of from 1500 to 5500 feet. Of the 84 towers which are between the 0.5 and 1.0 v/m contours, some are only 1900 feet from the array. Also within the 0.5 to 1.0 v/m field strength contours are 12 oil derricks. The record further establishes that an oil tank 30 to 40 feet high is in an area adjacent to the KRLA antenna site and that additional oil tanks and derricks are located west of the site and at distances less than one mile away. There are also numerous oil tanks and derricks in a hilly area rising some 500 feet above site elevation in the major lobe of the radiation pattern beginning approximately one mile west of the site. All of these oil tanks and derricks are potential reradiators. In connection with certain land reclamation and dredging projects in the area, earth moving cranes are used and a crane is shown by the record as operating in the vicinity of the site. As stated by the Review Board (par. 46, 29 FCC 2d at 554), such cranes can be a continuing source of troublesome reradiation "because of the number and variety of potential reradiation sources, and because these sources do not remain constant in their physical or electrical characteristics."

21. All of the structures and objects set forth above, particularly those in the higher ambient fields, are sources of potentially harmful reradiation which would cause antenna pattern distortion and objec-

[26] Of course, numerous other factors must be considered in choosing a site such as coverage, the possibility of overlap of the 2 mv/m and 25 mv/m contours with those of other stations, whether interference will be caused to other stations, and the extent of any interference which might be received from other stations. These matters are treated in other parts of this Decision.

[27] More specifically, the field intensities at these towers are as follows: 1 tower, 5.0–6.0 v/m; 3 towers, 4.0–5.0 v/m; 6 towers, 3.0–4.0 v/m; and 1 tower, 2.0–3.0 v/m (Rev. Bd. Decision, fn. 24, 29 FCC 2d at 551).

tionable co-channel interference to the secondary service area of station KFAB; and some of these reradiators may be the source of recurring problems. Furthermore, the evidence of record indicates the probability of future power line construction in the vicinity of the KRLA site which could create new reradiation and array adjustment problems. Consequently, there is a strong likelihood that the site would continue to be plagued by at least sporadic reradiation problems. Thus, not only would a time consuming and expensive undertaking be required to achieve the initial detuning of the numerous sources of reradiation at the KRLA site but substantial remedial action on a continuing basis would apparently be essential in order to maintain the required protection for KFAB, and with no assurance that a solution on a permanent basis would be found. We therefore conclude that the number of steel transmission line supporting towers in high ambient fields and their proximity to the proposed antenna array, the other objects enumerated above which are expected to require detuning, and the likelihood of continuing reradiation problems from existing objects and future construction, so substantially detract from the utility of the KRLA site as a transmitter site where a highly directional antenna array must be utilized as to make its continued use for that purpose inadvisable.

22. The Western site is approximately three miles from the KRLA site and some of the power line complexes which are near KRLA also pass the Western site. While we agree with the Review Board that Western's proposed site presents problems which are somewhat similar in nature to those at the site proposed by the Joint Siters, we reject as wholly unwarranted the further holding that in order to find the Western site satisfactory "Western's evidence would have to establish that Western's site is markedly superior to KRLA's site with respect to any radiation problems" (29 FCC 2d at 591). No such burden devolves upon Western. The applicant has the same burden of establishing the satisfactory nature of its proposed site as do the other applicants but no more. In order to obtain a comparative advantage it must show a degree of superiority over the others, but there is no justification for imposing upon Western the "markedly superior" standard merely to establish that its proposed site is acceptable.

23. Furthermore, we find substantial differences between the KRLA and proposed Western sites. Some of the major differences are clearly demonstrated by the following comparison of the number of steel transmission line supporting towers within the pertinent ambient fields:

Ambient field	Number of towers	
	Western	KRLA
5.0 to 6.0 v/m	0	1
4.0 to 5.0 v/m	0	3
3.0 to 4.0 v/m	0	6
2.0 to 3.0 v/m	[1] 1	1
1.0 to 2.0 v/m	21	36
0.5 to 1.0 v/m	31	84
Total	53	131

[1] 2.045 v/m.

Thus, not only is the total number of towers far less but only 1 tower is within the 2.0 v/m field strength contour of Western's site as compared to 11 for the KRLA site. Also, no tower within the ambient fields set forth above, is closer than about 1230 feet from the approximate center of the Western site. Although there are several low metallic buildings near the array and two advertising signs are located 480 and 872 feet northwest from the center of the array, the detuning of these objects presents no significant problem; and there are no other potential reradiation sources disclosed in the hearing record.

24. Since the potentially troublesome reradiators at the proposed Western site are far fewer in number, are located in lower ambient fields, and in general are farther from the directional antenna array than those at the KRLA site, the reradiation problems at the Western site manifestly are far less complex and considerably less serious. Besides, there is no evidence of record of proposed changes in the vicinity of the Western site which are likely to cause future reradiation problems. On the basis of the foregoing, we conclude that the likelihood of a trouble free directional antenna operation is substantially greater at the proposed Western site than at the site proposed by the Joint Siters and that, insofar as the matter of reradiation is concerned, the Western site is clearly to be preferred.[28]

25. The area proposed by Pacific Fine Music for its transmitter is located about six miles northeast of Whittier on property which is used as a dairy and, so far as the record shows, no change in the operation is contemplated even if the antenna towers are erected there. A detailed description of the proposed site and the problems presented by reradiators on and off the premises is contained in the Review Board's Decision (pars. 88–102, and 137–141; 29 FCC 2d at 571–577, and 592–594), and need only be summarized here. Located on the site are approximately six steel light poles. In addition there are many one story structures such as sheds, storage barns, and other buildings which are part metal and part wood. The property is subdivided into open pens or feed lots for the cattle, and numerous wire fences with metal fence posts surround the open pens, shelter areas, and some of the dairy buildings. Many water pipes lie on the ground surface and a metal water tank is located near the southeastern edge of the dairy property. About 0.6 mile southwest of the center of the Pacific Fine Music array and in the major lobe of its nighttime directional pattern is a power line complex consisting of 3 parallel lines of steel towers some of which are 100 feet in height. Also, in the major lobe and starting at a point about 0.3 mile west of the site, and again at a point 0.2 mile east of the property, in an area where the proposed nighttime field would be 2.8 v/m, the high voltage transmission lines are transferred to steel A-frame supporting structures which are 50–60 feet high. These objects and others, both on and off the premises, enumerated by the Review Board could cause severe reradiation problems which are likely to affect adversely the adjustment and main-

[28] In our view, the evidence of record shows that Western will be able to make adequate measurements for a satisfactory proof of performance. See pars. 311 and 312 of the Initial Decision, 29 FCC 2d at 703–704.

tenance of the nighttime directional antenna array, and which may be most difficult to solve.

26. In addition, Pacific Fine Music would be faced with substantial problems in the installation of the array. For the most part, this applicant's radio towers and ground system would occupy portions of the dairy property which is subdivided into open pens for cattle and where some of the dairy buildings are located. Due to the numerous on-site structures, including wire fences and metal posts, shelters, ditches, roads, and bridges, installation of the array would be a difficult and troublesome undertaking; and such installation problems could also adversely affect the maintenance of the array.

27. The proposed transmitter site of Orange is located about 4 miles north of the city limits of Fullerton in flat farmland. Although there are railroad tracks and utility pole line construction in the vicinity of the site, these should cause no significant reradiation problems. A right of way for a proposed freeway borders the southern edge of the site but at the time of the hearing, the area was still farmland. No other significant sources of potential reradiation are disclosed by the record.

28. Thus, the problem of reradiation at the Orange site appears to be less than at the other sites. Because of the number, location, and character of the reradiators in the vicinity of KRLA, and the other factors detailed above, we find the site proposed by the Joint Siters to be, by far, the most unsatisfactory. While the reradiation problems at the Pacific Fine Music site are not likely to be as formidable as those at the site proposed by the Joint Siters, they are nevertheless serious. In view of the considerable number of objects which might have to be detuned, the substantial difficulties which are likely to be encountered in the installation of its array, and the probable adverse effect upon the adjustment and maintenance of the directional antenna array as a result thereof, we find the Pacific Fine Music site to be only slightly better than that of the Joint Siters. Although reradiation problems may be expected at the Western site, we believe that they are of manageable proportions and that adequate protection to KFAB is reasonably assured.

29. Another factor having an important bearing on the adjustment and maintenance of a directional antenna array is the electrical stability of the array. A yardstick commonly used to assess the stability of directional antenna arrays is the ratio of the RSS (root-sum-square of the individual towers) field to minimum field, the larger ratios being indicative of less stable arrays. The minimum MEOV (maximum expected operating value) is that which is necessary to protect KFAB at night at an azimuth of 65 degrees true at an elevation angle of 15 degrees. In his Initial Decision the presiding officer held (par. 320, 29 FCC 2d at 706): "Since the Western array has an RSS/MEOV ratio lower than that of the other proposals, it should be less difficult to adjust and more stable to maintain within the MEOV insofar as day to day variations of phase and current ratio are concerned than the others."

30. A comparison of the RSS to minimum MEOV ratios for the applicants' arrays summarized in the table below demonstrates that this finding is amply supported by the record:

Applicant	Power (kilowatt)	15° elevation angle		
		RSS mv/m [1]	MEOV mv/m [2]	RSS/MEOV [3]
Orange	10	563	7.7	73.2
PFM	10	665	13.8	48.2
Western	10	543	14.3	38.0
Joint Siters	10	611	15.5	39.4

[1] Root sum square of the individual towers, millivolt per meter.
[2] Maximum expected operating value, millivolt per meter.
[3] Root sum square of the individual towers per maximum expected operating value.

From the above, it must be concluded that the Orange array is the least stable of those proposed by the applicants and that the Western array is the most stable. The difference between the array of the Joint Siters and of Western is slight but the latter is considerably better than Pacific Fine Music's.

31. Other evidence of record reinforces our view that Western proposes the most stable array. As previously stated, the critical nighttime problem confronting all of the applicants is that of protecting the secondary service area of station KFAB at Omaha, Nebraska. Since a high degree of radiation suppression in the KFAB direction must be maintained by all of the nighttime arrays, small variations in operating parameters such as tower phases and current ratios, which could affect the resultant radiated field magnitudes, become important in assessing array stabilities. Studies of the effects of such variations are available in the record and are summarized below.

32. Western proposes to adjust its array in the KFAB direction to values ranging from 7 to 19 mv/m, which would always be at least 7 mv/m below the MEOV. Based on such an adjustment Western's MEOVs will not be exceeded if the parameter variations do not go beyond 0.5 percent in current ratio and 0.3 degree in phase under a "worst case" condition, which is statistically unlikely.

33. The Joint Siters propose to use the existing KRLA nighttime array and adjust it close to calculated values. Based on such adjustment, the KRLA study indicates a capability of operating within specified MEOVs provided the operating tolerances do not exceed 1.3 percent in current ratios and 0.75 degree in tower phase. In view of the demonstrated reradiation problems at the KRLA site, the likelihood of the existing KRLA nighttime array being closely adjusted to calculated values is small. Doubt is therefore cast on these tolerances.

34. With respect to the Pacific Fine Music array, the record indicates that the adjustment values would be generally in the order of 10 mv/m rather than the calculated values, which, in the KFAB direction, are equal to 2 mv/m or less. Based on the 10 mv/m adjustment values, deviations of current ratios and phase of 0.5 percent and 0.5 degree, respectively, would cause Pacific Fine Music's MEOVs to be exceeded in the KFAB direction, under the most adverse combination of changes. This applicant made no showing of the extent to which cur-

rent ratio changes and phase deviations could be varied without exceeding the MEOVs, if such variations were imposed on an initial adjustment of 10 mv/m.

35. The Orange applicant showed that, under worst conditions, 1 percent current ratio and 1 degree phase changes applied to calculated radiation values would result in radiated fields in excess of the MEOVs over the entire KFAB protection arc. However, Orange did not specify the initial adjustment values of its array, and it made no showing of the extent to which current ratios and phase deviations could be varied without exceeding the MEOVs.

36. Thus, on the basis of the parameter change studies, the Western array is again indicated as the most stable one. Because of the doubt as to the operating tolerances upon which the Joint Siters rely, their showing is less indicative of the potential array stability than that of Western. Insofar as Orange and Pacific Fine Music are concerned, their tolerance studies are at best inconclusive.

37. Site suitability and adjustment and maintenance of directional antenna systems are interrelated factors which must be considered together in the circumstances of this case since they go to the problem of protecting KFAB's secondary service area. As has been shown by the studies discussed above, Western proposes the most stable array of any applicant. However, some reradiation problems may be expected from its site. Orange has a site with the least reradiation problems but it proposes the least stable array of any applicant. In our judgment, and based on our overall evaluation of the facts going to site suitability, and adjustment and maintenance of directional antenna arrays, we find no difference of decisional significance between the Western and Orange proposals as to those issues. The proposals of Pacific Fine Music and the Joint Siters hold out no comparable promise of satisfactory protection to KFAB and they are clearly inferior to the Western and Orange proposals.

OBJECTIONABLE INTERFERENCE TO DONNELLY C. REEVES

38. During the pendency of this proceeding, and long after the commencement of Oak Knoll's operation on the 1110 kHz frequency, a construction permit was granted to Donnelly C. Reeves for a standard broadcast station on 1110 kHz at Roseville, California (6 FCC 2d 531 (1967)). That station, with the call letters KPOP, receives interference from KFAB at Omaha, Nebraska, and KBND at Bend, Oregon to the extent of 42 percent of the population within its normally protected nighttime coverage area and the interference received nighttime from the existing KRLA operation affects an additional 40 percent. The proposals of the Joint Siters and Western would likewise result in a 40 percent interference in addition to the 42 percent from KFAB and KBND. Pacific Fine Music would affect only 14 percent and Orange would cause no additional interference to KPOP.

39. Thus, insofar as interference to KPOP is concerned, Pacific Fine Music and Orange present technically more efficient proposals, and the proposal of Orange is superior to that of Pacific Fine Music. However, a number of factors detract from the significance which may

be attached to these differences among the applicants. In the first place, KPOP received its permit with full knowledge of the existing interference and must be presumed to have accepted the grant subject to that interference.[29] It has never served the population within the aforementioned interference areas, so no withdrawal of an existing service is involved herein, and at least three stations provide primary service to the said areas. Furthermore, no exceptions were filed by KPOP to the findings of the Administrative Law Judge that in making the grant to KPOP, the Commission relied upon the applicant's representations that it proposed a local service for Roseville,[30] not Sacramento where the interference principally occurs (29 FCC 2d at 757 par. 476). Section 1.277 expressly provides that any objection not saved by an exception is waived and KPOP has no standing to challenge the ALJ's finding at this stage of the proceeding. Nevertheless, in the exercise of our discretion, we afforded KPOP an opportunity to present oral argument so that any additional public interest considerations could be brought to our attention prior to the issuance of a final decision in this case. We have considered KPOP's arguments but are not persuaded that any particularly meritorious circumstances or public interest considerations exist which justify special treatment. While we shall consider the matter of interference to KPOP in our overall evaluation of the efficiency of the applicants' proposals, we believe that such interference is entitled to only limited weight.

THE OVERLAP ISSUE

40. The overlap issue (Issue No. 12) was included in order to determine whether overlap of the 2 and 25 mv/m contours in violation of Section 73.37 of the Rules [31] would occur between certain of the proposals and Station KSDO at San Diego, California. The presiding judge found that no prohibited overlap would result from the proposals of Western or Orange and no question has been raised as to these findings. He also held that no overlap would occur as to the Pacific Fine Music proposal but the Bureau has excepted to that finding. With respect to the Joint Siters the Judge found that some overlap would occur but that it was inconsequential and the Bureau excepts to this characterization of the overlap. The Review Board noted that, after the record was closed, KSDO was granted a construction permit to move its transmitter site and to make other changes (29 FCC 2d at 537, footnote 7), and it assumed for the purpose of its decision that there would be no overlap (29 FCC 2d at 543, footnote 16). We must reject the ALJ's finding of no overlap by Pacific Fine Music and his

[29] In this connection see *Lorain Broadcasting Co., et al.*, 5 FCC 2d 133 (1966); and *Salter Broadcasting Co. (WBEL) et al.*, 6 FCC 2d 809 (1967).

[30] See also, *Donnelly C. Reeves*, 6 FCC 2d 531, for a statement of KPOP's representations to the Commission.

[31] The provisions of the Rule applicable to the proposals under consideration are as follows: "An authorization will not be granted for a station on a frequency of plus or minus 30 kHz from that of another station if the area enclosed by the 25 mv/m groundwave contours of the two stations overlap, nor will an authorization be granted for the operation of a station on a frequency plus or minus 20 kHz or plus or minus 10 kHz from the frequency of another station if the area enclosed by the 25 mv/m groundwave contour of either one overlaps the area enclosed by the 2 mv/m groundwave contour of the other."

characterization of the overlap by the Joint Siters as inconsequential, and the Review Board's assumption of no overlap as to any of the applicants. In a long drawn out and complex case such as this, some changes are likely to occur after the close of the record and prior to the issuance of a final decision. However, since no substantial public interest considerations otherwise require, we believe that the decision in this adjudicatory proceeding should be based on the situation as it existed when the record was closed.

41. In this case, measurements were taken on the subject of overlap and exhibits with respect thereto were introduced into evidence. According to such exhibits, Pacific Fine Music's daytime 25 mv/m contour would overlap KSDO's 2 mv/m contour to a depth of about 0.3 mile; and the ALJ's finding to the contrary is in error. With respect to the Joint Siters, the ALJ's findings concerning overlap with KSDO are correct (Initial Decision, pars. 328 and 333, 29 FCC 2d at 708–710) and they are affirmed. Admittedly the extent of the overlap by these applicants is not substantial. However, whether the overlap is inconsequential depends on the circumstances of the case taken as a whole. In a comparative hearing where numerous factors are to be weighed and balanced, a minor difference may be dispositive. We shall therefore discuss further the weight to be given this issue in our final summation as to the relative merits of the applications.

THE 10-PERCENT RULE [32]

42. Each of the proposals under consideration will receive interference within its normally protected nighttime contour from other existing operations. Thus the nighttime interference received by Orange will affect 23.2 percent of the population within its normally protected primary service area; Pacific Fine Music, 16.1 percent; the Joint Siters, from 14.2 to 15.5 percent (depending on the method used to compute the contours); and Western, 9.26 percent. However, under the provisions of the rules which govern the disposition of this proceeding, interference which does not affect more than 10 percent of the population within the proposed station's normally protected contour is permissible.[33] Therefore, the Commission designated appropriate issues to determine whether any of the applicants, other than Western which manifestly is not in violation of the ten percent rule, is entitled to either an exemption or a waiver of the rule.

43. Contrary to the determination of the Review Board, we conclude that Orange is not entitled to an exemption as a proposal which

[32] Under rules adopted July 1, 1964, stringent requirements were imposed as conditions to the acceptance of new applications for AM facilities. *AM Station Assignment Standards* (Docket 15084) 2 RR 2d 1658. However, the ten percent rule applies to applications filed prior to July 13, 1964 and therefore governs this case.

[33] The pertinent provisions of Section 73.28(d) of our Rules (the ten percent rule) applicable to this proceeding are as follows: "With respect to applications for new Class II–A stations . . . the following shall apply: Upon showing that a need exists, a Class II . . . station may be assigned to a channel available for such class, even though interference will be received within its normally protected contour, subject to the following conditions: . . . (3) The interference received does not affect more than 10 percent of the population in the proposed station's normally protected primary service area; however, in the event that the nighttime interference received by a proposed Class II . . . station would exceed this amount, then an assignment may be made if the proposed station would provide either a standard broadcast nighttime facility to a community not having such a facility or if 25 percent or more of the nighttime primary service area of the proposed station is without primary nighttime service."

would "provide . . . a standard broadcast nighttime facility to a community not having such a facility." As we explained in some detail in our discussion of the fair and equitable distribution aspects of Section 307(b) and the *Suburban Community Policy* (supra, pars. 7–12), a fundamental consideration in our authorization and our determination that the assignment must remain essentially *in status quo* as a high power facility is the public interest factor of *providing wide area coverage to the southern California area.* It would be totally inconsistent with the principles underlying our retention of this facility as a high power, wide area coverage station to accord an exemption to Orange on the ground that it would *provide* a first nighttime facility *to Fullerton*, a community with a 1960 population of 56,180 persons; and in no realistic sense may this 50 kw daytime, 10 kw nighttime proposal be considered as *providing* a service to Fullerton within the meaning of the rule. Therefore, Orange is in violation of the rule as are all of the other applications except Western and, in order to receive a grant, it must establish that it merits a waiver.

44. Before undertaking to determine whether any of the applicants is deserving of a waiver, we deem it imperative to emphasize the significance of the ten percent rule. It is a basic allocations tool which has as a principal objective the prevention of the degradation or deterioration of radio service. An assignment where more than ten percent of the population within the proposed station's normally protected contours would not receive service due to objectionable interference constitutes an inefficient utilization of the available frequencies. Moreover, the addition of an assignment which causes even a negligible amount of interference tends to degrade the service of existing stations since "the sum total of a large number of operations which individually cause a negligible amount of interference is not negligible". *Revision of Ten Percent Rule*, 19 FR 5141, 10 RR 1595 at 1598, footnote 2, (1954). Because of the importance attached to the rule, the Commission has granted waivers only upon a substantial showing of unusual circumstances which clearly demonstrates that the public interest required such exceptional action. *Louis Adelman*, 28 FCC 432 (1960) reconsideration denied 29 FCC 1223, affirmed *sub nom. Guinan* v. *Federal Communications Commission*, 111 U.S. App. D.C. 371, 297 F. 2d 782 (1961). Although the Commission has indicated that it would be less strict in granting waivers for a nighttime than for a daytime deviation,[34] we have nevertheless insisted upon a substantial showing of particularly meritorious public interest considerations for even nighttime violations, and have denied the applications where such a showing was not made. *James S. Rivers, Inc.* (*WJAZ*) 37 FCC 658 (Rev. Bd., 1964), review denied FCC 64–1068 (1964), affirmed *sub nom. James S. Rivers, Inc.* v. *F.C.C.*, 122 U.S. App. D.C. 29, 351 F. 2d 194 (1965); *Ottawa Corporation* (*WJBL*), 1 FCC 2d 1502 (Rev. Bd., 1965), review denied FCC 66–148 (1966), petition for leave to file petition for reconsideration denied, 4 FCC 2d 264 (1966); *Mel Lin-Inc.*, 22 FCC 2d 165 (1970), reconsideration denied 26 FCC 2d 767, reaffirmed 26 FCC 2d 976.

[34] *North Central Video, Inc. (KWEB)*, 3 FCC 2d 874 (1966); *Granite State Broadcasting Co., Inc.*, 27 FCC 197 (1959).

45. In this case where there appear to be so many engineering difficulties to overcome and where we are endeavoring to choose the applicant which will make the most efficient use of this frequency, we perceive no such outstanding circumstances which would warrant a waiver of the ten percent rule in favor of any of the applicants. Nighttime, Pasadena receives primary service from a minimum of seven stations; and Fullerton and Whittier from a minimum of nine stations. There is no claim by any applicant that it will bring a first, second, or even a third service to any portion of its proposed service area either daytime or nighttime; and no other exceptional public interest benefits have been shown to support a waiver. Moreover, in determining whether a waiver should be granted, considerable weight must be given to the fact that the proposal of one of the applicants complies with the rule. See *S & W Enterprises, Inc.*, 37 FCC 220 (1964). Western is the only applicant before us with a proposal which would receive less than ten percent interference and which therefore does not require a waiver.

46. The significance of the ten percent rule is further demonstrated in this case by a comparison of the number of persons within the area of each proposal who would receive nighttime interference from existing stations. Thus Orange's 23.2 percent population loss as a result of the interference it would receive involves 923,827 more persons than result from the 9.26 percent population loss of the Western proposal. As for the Joint Siters, from 307,963 to 389,719 more persons would be affected by the 14.2 percent to 15.5 percent population loss due to the interference to which their proposals would be subjected than would be affected by the interference to Western; and Pacific Fine Music's 16.1 percent interference loss amounts to 394,473 more persons than Western's 9.26 percent interference loss.[35] A substantial advantage for superior efficiency therefore accrues to Western by reason of its compliance with the ten percent rule.

ULTIMATE FINDINGS AND CONCLUSIONS

47. As we have heretofore indicated, our objective in this proceeding is to obtain an operation which will provide an improved service over that of the existing KRLA facilities and which will make the most effective use of the 1110 kHz frequency in the Los Angeles and southern California areas. Consequently, the technical, engineering, and other issues which concern the efficiency of each of the several proposals are the overriding and dispositive considerations in our determination as to which applicant should be awarded a license for the 1110 kHz frequency.[36]

[35] The overall estimated nighttime population and area coverage of each proposal is as follows:

	Population	*Area (sq. miles)*
Western	5,697,499	1,215
Joint Siters	5,279,450–5,378,857	978–1,018
Pacific Fine Music	5,080,118	1,078
Orange	4,966,362	1,010

[36] See *Grand Haven Broadcasting Co. et al.*, 14 FCC 1351, 1361 (1950) where it was stated that, as used in Section 307(b) of the Act, efficiency means that the frequency be used: "so as to provide service to the greatest population and area possible, and that it be allocated with appropriate consideration being given to the interference problems involved and the character of and existing service in the areas to be served in order to produce the maximum service, both transmission and reception, to the communities and States."

48. Due to the number of potential reradiators in high ambient fields near the existing KRLA transmitter site, which the Joint Siters propose to use, and the other evidence of record detailed above which indicates the likelihood of substantial and continuing problems in the adjustment and maintenance of the directional antenna system necessary to protect KFAB, we find the KRLA site to be the least desirable of the sites proposed by the applicants in this proceeding. In addition, the proposal of each of the Joint Siters would violate Section 73.28(d) of the Rules, the ten percent rule. This violation weighs heavily against an award to one of the Joint Siters since the excessive interference received means an inefficient operation and we are striving to obtain an operation which will make a more efficient use of this frequency. Not as significant, but nevertheless to be considered in determining the relative efficiency of the proposals before us, is the fact that the Joint Siters would also be in violation of Section 73.37 (prohibited overlap with KSDO) and would cause interference within the normally protected nighttime coverage area of Reeves (KPOP). For all of these reasons, we conclude that a grant to any one of the Joint Siters is inadvisable and would not be consistent with the public interest.

49. The site selected by Pacific Fine Music for its transmitter is likewise undesirable. Not only is there a substantial likelihood of serious reradiation problems, but difficulties in the installation of its ground system may also be expected because of the pens, fences, buildings and other structures on the site. In addition, its proposal would result in a greater nighttime violation of the ten percent rule than that of the Joint Siters (16.1 percent as compared to 14.2–15.5 percent by the Joint Siters.) The Pacific Fine Music proposal would also result in prohibited overlap with KSDO at San Diego, although we consider this violation to be of minor significance. We have taken into account the fact that the Pacific Fine Music proposal would result in less interference to KPOP than that of any applicant other than Orange and, of course, this is a factor in its favor. However, as we have indicated above, the matter of interference to KPOP merits only limited weight. In our view the adverse factors clearly outweigh the one favorable factor and we conclude that a grant to Pacific Fine Music would be inconsistent with the public interest.

50. Neither the Orange nor the Western proposal would result in prohibited overlap with KSDO. With respect to site suitability and the adjustment and maintenance of their respective directional antenna systems, we believe that each proposal gives adequate assurance of providing the necessary protection to KFAB and that neither applicant merits a preference over the other as to those matters. A slight demerit must be assessed against Orange since its predicted 0.5 mv/m daytime contour falls short of the Mexican border and consequently its proposal does not afford the same protection to the interests of the United States under its international agreements with Mexico as do the proposals of the other applicants. However, Orange is the only applicant which will not cause additional interference to KPOP and it merits a plus for enabling KPOP to increase its service area. Nevertheless, for the reasons heretofore stated, this fact is entitled to little weight. In our view, the fact that the interference which would be

received by Orange in violation of the ten percent rule is greater than that of any other applicant is an overriding consideration which outweighs any factors in its favor. Since Western is in compliance with the rule, the only adverse factor is the minor one of causing additional interference to KPOP, and its proposal holds out the greatest promise of an improved operation which will make the most efficient use of the 1110 kHz frequency in the southern California area, we conclude that a grant of Western's application would best serve the public interest.[37]

THE INTERIM OPERATION

51. In the order granting interim authorization to Oak Knoll Broadcating Corp. to operate KRLA pending a decision in the comparative proceeding for a regular authorization (FCC 64–665, 2 RR 2d 1011 released July 20, 1964) we provided that the interim operation would terminate "at 3:00 a.m., local time, on the day following the release of a Decision in the pending proceeding — — —, or at such other time as the said Decision may specify" (2 RR 2d at 1029). Since the successful applicant proposes to construct new facilities at a different site than that occupied by existing KRLA, we believe that the takeover of operations by Western at this time would be both impracticable and inadvisable. A smoother transition of control from the interim operator to the regular operator herein authorized will be effected, in our view, by keying the transfer of broadcast operations to the date when program test authority is granted. Under this procedure, Oak Knoll will be afforded an opportunity to wind up its affairs. Western will be able to complete construction of its facilities before assuming the responsibilities of broadcast operations, and the public interest will be served by the effectuation of a transfer of operations with no break in the continuity of service to the station's listeners. Western should make every effort to complete the construction of its station as expeditiously as possible so that service may be commenced with the new and improved facilities which it has proposed in this proceeding. Oak Knoll should be advised when an application is submitted to the Commission for program test authority so that it may prepare for the discontinuance of its interim operation.

52. Accordingly, IT IS ORDERED, That

(a) the application for a construction permit (File No. BP–16173) filed by Western Broadcasting Corp., of Pasadena, California IS GRANTED;

(b) the applications for construction permits filed by Goodson-Todman Broadcasting, Inc., of Pasadena, California (File No. BP–16159); Orange Radio, Inc., of Fullerton, California (File No. BP–16160); Pacific Fine Music, Inc., of Whittier, California (File No. BP–16161); Robert S. Morton, Arthur Hanisch, Macdonald Carey, Ben F. Smith, Donald C. McBain, Robert Breckner, Louis R. Vincenti, Robert C. Mardian, James B. Boyle, Robert M. Vaillancourt, and Edwin Earl, d/b/a Crown City

[37] This action makes the remand proceeding ordered by the Board unnecessary, thereby rendering moot a petition for reconsideration of our Order, 33 FCC 2d 821 (1972) filed March 31, 1972, by Hughes Tool Company, and an accompanying request for waiver of our rules to allow the filing of the petition for reconsideration.

Broadcasting Co., of Pasadena, California (File No. BP-16168); Voice In Pasadena, Inc., of Pasadena, California (File No. BP-16172); and Pasadena Broadcasting Co., of Pasadena, California (File No. BP-16174) ARE DENIED; and

(c) the request for waiver of rules and petition for reconsideration filed March 31, 1972, by Hughes Tool Co. IS DISMISSED; and

(d) the interim authority of Oak Knoll Broadcasting Corp. to utilize the existing KRLA facilities SHALL TERMINATE at 3:00 a.m., local time, on the day following the release date of the order of the Commission granting program test authority to Western Broadcasting Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

DISSENTING STATEMENT OF COMMISSIONER ROBERT E. LEE

I dissent to the decision reached today by the majority of the Commission which overruled the Review Board's decision released May 26, 1971 (29 FCC 2d 533). The Board disqualified all the applicants to this proceeding *except* Orange Radio Inc., Fullerton, California, on technical engineering grounds. However, the Orange application could not, at that point in time, be granted without further hearing on the issue of character qualification of some of the principals involved in Orange Radio Inc.

I believe the actions of the Board on May 26, 1971, were correct. The Commission should resolve this important issue, i.e., character qualification, before reaching any final decision. The additional delay in resolving this important issue would not adversely affect the public interest. The public, for nearly ten years, has been served well by the Oak Knoll Broadcast Company (a non-profit organization), operating KRLA facilities under an interim FCC authorization. In addition, it should be noted that such organization has donated a percentage of its profits (earned from the interim operation of the KRLA facilities) to educational television in the Southern California area.

Therefore, for reasons stated above, I dissent to the decision reached today by the majority of the Commission.

F.C.C. 74-42

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of GREATER NEW ENGLAND CABLEVISION CO., WILBRAHAM, MASS. For Certificate of Compliance	CAC-632, CSR-204 MA054

MEMORANDUM OPINION AND ORDER

(Adopted January 9, 1974; Released January 15, 1974)

BY THE COMMISSION: COMMISSIONER WILEY CONCURRING IN THE RESULT

1. Greater New England Cablevision Company, Inc. (GNEC) has filed the above-captioned application for certificate of compliance to begin cable television service at Wilbraham, Massachusetts (Pop. 11,984). Wilbraham is a community located within three television markets: a) the Hartford-New Haven-New Britain-Waterbury, Connecticut major television market (#19); b) the Boston-Cambridge-Worcester, Massachusetts major television market (#6); and c) the Springfield, Massachusetts smaller television market. GNEC proposes to carry the following television broadcast signals on its 36-channel system:

WEDH (Educ., Channel 24) Hartford, Connecticut.
WTIC-TV (CBS, Channel 3) Hartford, Connecticut.
WHCT-TV (Ind., Channel 18) Hartford, Connecticut.
WTNH-TV (ABC, Channel 8) New Haven, Connecticut.
WWLP (NBC, Channel 22) Springfield, Massachusetts.
WHYN-TV (ABC, Channel 40) Springfield, Massachusetts.
WGBY-TV (Educ., Channel 57) Springfield, Massachusetts.
WRLP-TV (NBC, Channel 32) Greenfield, Massachusetts.
WCDC (CBS, Channel 19) Adams, Massachusetts.
WSMW-TV (Ind., Channel 27) Worcester, Massachusetts.
WBZ-TV (NBC, Channel 4) Boston, Massachusetts.
WCVB-TV (ABC, Channel 5) Boston, Massachusetts.
WSBK-TV (Ind., Channel 38) Boston, Massachusetts.
WNAC-TV (CBS, Channel 7) Boston, Massachusetts.
WKBG-TV (Ind., Channel 56) Cambridge, Massachusetts.
WOR-TV (Ind., Channel 9) New York, New York.
WPIX (Ind., Channel 11) New York, New York.
WHNB-TV (NBC, Channel 30) New Britain, Connecticut.

Carriage of all the above-listed stations, except Station WCDC, is consistent with Section 76.61 of the Commission's Rules. GNEC asserts the right to carry Station WCDC pursuant to the grandfathering provisions of Section 76.65 of the Commission's Rules. GNEC's ap-

plication is opposed by The WHYN Stations Corporation, licensee of Station WHYN–TV, Springfield, Massachusetts; Broadcast Plaza, Inc., licensee of Station WTIC–TV, Hartford, Connecticut; and by Springfield Television Broadcasting Corporation, licensee of Television Broadcast Station WWLP, Springfield, Massachusetts, which has filed a petition for special relief.

2. In its objection, WHYN Stations argues that even though Wilbraham is located within two major television markets, the circumstances of the Springfield smaller television market justify allowing GNEC to carry only those signals consistent with the smaller television market signal carriage rules.[1] In support, WHYN Stations incorporates by reference its "Petition for Reconsideration" of the *Cable Television Report and Order*, FCC 72–108, 37 FCC 2d 143 (1972),[2] in which it argued that the effect of our new Rules is to increase drastically the number of new signals which may be brought into the Springfield market and to expose WHYN–TV to more competition than it would find in many major markets. Finally, WHYN Stations argues that its protection has been reduced because the network exclusivity rules have been changed to simultaneous exclusivity only, and that since Springfield is classified as a smaller television market, WHYN–TV is not entitled even to syndicated program exclusivity under Section 76.153(b) of the Rules. Accordingly, it urges that if GNEC is permitted to carry Boston and Hartford market stations which are not significantly viewed in Wilbraham, WHYN should at least receive syndicated program exclusivity. Springfield Television supports WHYN Stations' position, and argues further that failure to provide some measure of special relief could threaten the economic viability of the stations.

3. In its opposition, Broadcast Plaza contends that neither the application nor the franchise establishes that GNEC's qualifications were approved by the town of Wilbraham as part of a full public proceeding affording due process as required by Section 76.31(a)(1) of the Rules. In addition to this, Broadcast Plaza objects to the proposed carriage of WCDC because it is not "grandfathered." This is because, Broadcast Plaza asserts, GNEC had no franchise at the time it filed a former Section 74.1105 notification on January 5, 1972.[3]

4. The arguments made by Springfield and WHYN in Paragraph 2 above were previously considered and rejected in *Spectrum Cable Systems, Inc.*, FCC 73–257, 40 FCC 2d 1019 (1973), *reconsideration denied*, FCC 73–1342, —— FCC 2d —— (1973). Therein we held that objections or claims for special relief on the grounds of market fragmentation in the Springfield market, when the carriage is indisputably

[1] Section 76.61(f) of the Commission's Rules provides that if a system is located in both a major and a smaller television market, the major market signal carriage rules apply.

[2] In par. 49, *Reconsideration of the Cable Television Report and Order*, FCC 72–530, 36 FCC 236, 345 (1972), we determined that this petition "may be meritorious" but that the preferable procedure would be to defer consideration of it for the certificating process where requests for special relief could be ruled on.

[3] Broadcast Plaza's position is that Section 74.1105(a) required a prospective cable television system operator to have a valid franchise before notifying local television stations of its intent to inaugurate new cable service.

authorized under the carriage rules, must be supported by specific financial data:

> The showing which it was thought would have to be made was expected to include "specifics regarding its present financial condition, the impact any present CATV activity has had on its operation, or the exact nature of the other CATV operations it refers to." *E.g., GT&E Communications, Inc.*, FCC 67–134, 6 FCC 2d 643 (1967). [footnote omitted]. While these considerations are not intended to be all inclusive, it is obvious that some demonstration along these lines must be made if the request for special relief is to be viewed as more than mere speculation. *Central New York Cable TV, Inc.*, FCC 67–1381, 11 FCC 2d 150, 153 (1967).

In the instant case, as in the *Spectrum* case, WHYN Stations and Springfield—both of which operate network-affiliated stations which will receive the benefits of network program exclusivity—have not submitted evidence to establish any likelihood of financial injury resulting from the proposal. Accordingly, we are not persuaded by the arguments of WHYN and Springfield Television to limit GNEC's proposed signal carriage. However, following the procedure established in the *Spectrum* decision, we will require that GNEC extend first fifty major television market syndicated exclusivity pursuant to Section 76.151, *et seq.* of the Rules to WHYN–TV and WWLP.

5. The argument made by Broadcast Plaza in Paragraph 3 above is rejected. By submission of various newspaper articles which provided notice to the interested public of the town council meetings, as well as an historical account of that meeting, and a certified copy of town council minutes, wherein the franchise award was declared effective December 28, 1971, GNEC has demonstrated not only that it held a valid franchise before January 5, 1972, but also that its qualifications were considered by the franchising authority. Consequently, carriage of WCDC is grandfathered. Although not raised in the objections, we believe it appropriate to note certain variations in GNEC's franchise from the standards of Section 76.31. The initial term of the franchise is 15 years. Subscriber rates are established which can only be changed with the consent of the town council. A three-year construction period is specified, and the construction will proceed in accordance with applicable Commission requirements. Finally, franchise terms are "subject to all existing federal . . . regulations and . . . [regulations] which may be promulgated in the future . . . ." Only substantial compliance with Section 76.31 of the Rules must be demonstrated for franchises granted before March 31, 1972, and, measured by the criteria established by *CATV of Rockford, Inc.*, FCC 72–1005, 38 FCC 2d 10 (1972), *reconsideration denied*, FCC 73–293, 40 FCC 2d 493 (1973), we find that this franchise substantially complies with Section 76.31 of the Rules in a manner sufficient to justify a grant of the above-captioned application until March 31, 1977.

In view of the foregoing the Commission finds that a grant of the above-captioned application would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objections to Application for Certification" filed July 27, 1972, by Broadcast Plaza, Inc., IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Special Relief" filed August 7, 1972, by Springfield Television Broadcasting Corporation, IS DENIED.

IT IS FURTHER ORDERED, That the "Objection to Application for Certificate of Compliance and for Special Relief" filed July 25, 1972, by The WHYN Stations Corporation, IS GRANTED to the extent indicated above and in all other respects IS DENIED.

IT IS FURTHER ORDERED, That Greater New England Cablevision Company, Inc.'s application (CAC–632) IS GRANTED, with the condition contained in Paragraph 4 above, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–67

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Notification to
VARIOUS COMPLAINANTS CONCERNING APPLICATION FOR ASSIGNMENT OF STATION WCAS, CAMBRIDGE, MASS.

JANUARY 23, 1974.

DEAR ———, ———: This refers to your letter concerning the application for assignment of license of WCAS, Cambridge, Mass. from Kaiser Broadcasting Corporation to Family Stations, Inc. (BAL–7963). The Commission has received a number of letters concerning the assignment. Some of the letters merely protest the assignee's proposed change of entertainment format. Some of the letters are from members of The Committee Against the Sale of WCAS and also express concern that the assignee will neglect the local interests of Cambridge, and that it will promote its own religious doctrine without "allowing other religious points of view to have equal time." The Committee also indicates that it is interested in forming a local corporation to purchase the station.

Whereas the assignor's format has been a mixture of various kinds of popular music, including rock, folk/rock, folk and popular vocal music, the assignee proposes to have a religious format consisting of religious talk programming and religious music. In this case the proposed change of format does not require a hearing on the application. The assignor, using its present format, has sustained substantial operating losses, and the types of music now broadcast on WCAS are available on other radio stations in the Boston area. Therefore the Commission has determined that the format change in this case is consistent with the most recent ruling of the Court of Appeals on the question of change of program format, *Citizens Committee to Keep Progressive Rock v. FCC* (No. 72–1675, D.C. Cir., May 4, 1973).

The assignee has also proposed programming to deal with local community needs and problems. It will devote 5% of its broadcast time each week to news, of which 30% will be local and regional news, and it will broadcast approximately three hours per week of public affairs programs dealing with local problems and a one hour discussion program each month dealing with a topic of importance in the listening area. These programs are: *The Cambridge Black Experience*, a half hour program to be broadcast weekly on Saturdays at 10:00 AM concerning the needs and problems of the Black community; *Cambridge Community Special*, a one hour discussion program to be broadcast once a month dealing with a topic of importance in the listening area: *WCAS Report*, a five minute program to be broadcast five times a week on local community problems; and *Open Forum*, a 90 minute telephone talk program to be broadcast weekly at 1:30 PM on Thursdays. *The*

Cambridge Black Experience and *Cambridge Community Special* have also been broadcast by the assignor.

With reference to the Committee's concern that the assignee's religious programming will have a definite bias and that it will not give equal time to other religious points of view, the assignee states,

> Family Stations will not discriminate against other religious viewpoints in its operation of WCAS. First, it should be emphasized that Family Stations is not affiliated with any church or specific religious denomination. Secondly, in its regularly scheduled programming, WCAS, like all other Family-owned stations, will have programs dealing with Catholic, Jewish, and a variety of Protestant viewpoints . . . ." Finally, on the two hour a week "Open Forum" program to be broadcast on WCAS, callers of every possible religious persuasion will be invited to call in and give their viewpoints. Based upon Family Stations' experience in broadcasting this program on its other stations, it anticipates that some callers will express tenants (sic) of the various Eastern religions, agnosticism, and other philosophies.

It should be noted that the "equal time" requirement of Sec. 315 of the Communications Act (47 U.S.C. Sec. 315) relates solely to the use of broadcast facilities by candidates for public office. With reference to the Committe's desire to acquire WCAS, Sec. 310(b) of the Communications Act (47 U.S.C. Sec. 310(b)) provides that in acting on an assignment or transfer application "the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed tranferee or assignee."

By Direction of the Commission,
Vincent J. Mullins, *Secretary*.

Form Letter to be sent to:

Ms. Carol Koundakjian
20 Livermore Road
Belmont, Mass. 02178

Mr. Mike Logan
106 Hobart Street
Danvers, Mass. 01923

Ms. Edythe L. Dodge
8 Broughton Rd.
Marblehead, Mass. 01945

Ms. Jill Paperno
3100 Belmont Road
Sommerville, Mass. 02193

Ms. Kathy Sands
30 Jackson Street
Salem, Mass. 01970

Mr. Richard Joyce
21 Stafford Road
Danvers, Mass. 01923

Ms. Christine Filbun
9 Overlook Road
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Mr. William Wolff, Jr.
48 Aldie Street
Allston, Mass.

Mr. Sam Bergman
48 Aldie Street
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Ms. Irene Bergman
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Ms. Linda Stern
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Mr. Thomas J. Filbin
37 Westvale Road
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Ms. Christian Wolfe
9 Clinton Path
Brookline, Mass. 02146

Mr. Daniel Weiss
9 Clinton Path
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Ms. Carol S. Axelrod
48 Aldie Street
Allston, Mass. 02134

F.C.C. 74-178

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
APPLICATION FOR EXEMPTION FROM THE PROVISIONS OF REGULATION 3, CHAPTER IV AND REGULATION 12, CHAPTER V OF THE SAFETY OF LIFE AT SEA CONVENTION, LONDON, 1960, FOR THE U.S. PASSENGER VESSELS "KALEETAN" AND "ELWHA"

ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH, ABSENT.

1. The Commission has received applications from Washington State Ferries for exemption from the radiotelegraph and radio direction-finding requirements of the Safety of Life at Sea Convention, London, 1960, for the following United States passenger ferry vessels:

Vessel	FCC file no.	Official no.	Gross tons	Number of crew	Number of passengers
Kaleetan	X-1173	508604	2704	16	2500
Elwha	X-1174	512324	2704	16	2500

2. The applicant makes the following statement in support of his requests:

a. the vessels will be navigated on inland waters between Anacortes, Washington and Sidney, Vancouver Island, British Columbia with stops at Lopez Island, Orcas Island, Shaw Island and San Juan Island;

b. the vessels will not be more than 1.5 nautical miles from the nearest land or ten nautical miles from the nearest ferry terminal;

c. the vessels are equipped with VHF radiotelephone installations capable of monitoring 156.8 MHz and 156.65 MHz simultaneously; and

d. with the short distances travelled and the number of VHF stations in the area no additional type of communications equipment will be required for safety of passengers at sea.

3. When the vessels are navigated on the above described international voyage, they are subject to the provisions of the Safety Convention. The vessels will always be within communications range of a United States Coast Guard or public coast station which maintains a continuous watch on 156.8 MHz. Under the circumstances described above, we find it unreasonable to require the KALEETAN and

ELWHA to comply with the radiotelegraph and radio direction-finding apparatus provisions of the Safety Convention.

4. Regulation 5, Chapter IV and Regulation 12(b), Chapter V authorize the Commission to exempt passenger vessels on international voyages from the radiotelegraph installation provisions and radio direction-finding apparatus provisions, respectively, of the Safety Convention if it considers the route or other conditions affecting safety are such as to render full application of these provisions unreasonable or unnecessary.

5. Accordingly, IT IS ORDERED, That the United States passenger ferry vessels KALEETAN, Official Number 508604 and ELWHA, Official Number 512324, be exempt from the radiotelegraph provisions of Regulation 3, Chapter IV and the radio direction-finding apparatus provisions of Regulation 12, Chapter V of the Safety of Life at Sea Convention, London, 1960, when navigated between Anacortes, Washington to Upright Head, Lopez Island via Thatcher Pass; then to Orcas Island via Harney Channel; Orcas Island to Friday Harbor, San Juan Island via Harney Channel, Friday Harbor to Sidney, Vancouver Island, British Columbia via San Juan Channel, Spieden Channel, across Haro Strait and return, never more than 1.5 nautical miles from the nearest land, for a period beginning the date of this Order and continuing for a period of one year; Provided, That: the vessels are equipped with VHF radiotelephone installations which fully comply with Title III, Part III, of the Communications Act of 1934, as amended, and the vessels are always within communications range of a public coast or United States Coast Guard station which maintains a continuous watch on 156.8 MHz.

6. This exemption may be terminated by the Commission at any time, if, in the Commission's discretion, the need of such action arises.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-194

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of GEORGE T. HERNREICH, TRADING AS KFPW BROADCASTING CO. (KFPW-TV), FORT SMITH, ARK. For License To Cover Construction Permit.	Docket No. 19291 File No. BLCT-2093
GEORGE T. HERNREICH (KAIT-TV), JONESBORO, ARK. For Renewal of License	Docket No. 19292 File No. BRCT-623

ORDER

(Adopted February 27, 1974; Released March 5, 1974)

BY THE COMMISSION:

1. The Commission has under consideration: (a) the Initial Decision, FCC 73D-18, released in this proceeding on April 25, 1973; (b) a Request for Oral Argument filed by George T. Hernreich on July 30, 1973,[1] and pleadings filed in connection with the appeal of the Initial Decision; and (c) a Motion for Acceptance of Additional Pleading filed by Hernreich on November 29, 1973, an opposition filed by the Broadcast Bureau on December 17, 1973, and a reply filed by Hernreich on December 20, 1973.

2. Hernreich, by his motion, requests that we accept two additional briefs in support of his exceptions to the Initial Decision so that he can call our attention to recent cases which have been released after submission of the usual pleadings in this proceeding. In view of the facts that Hernreich has already filed a lengthy brief in support of his exceptions and that he will have a full opportunity to present any relevant matter during the oral argument in this proceeding, we see no need or any useful purpose which would be served by accepting the two additional briefs proffered by Hernreich. However, it does appear that it would be appropriate for Hernreich to give notice of his intention to rely on certain recent cases so that no one will be surprised by the content of his oral argument. For this reason, we shall grant Hernreich's motion to the extent of taking official notice of his intention to rely on certain recent cases set forth in his additional briefs.

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[1] In his Request for Oral Argument, Hernreich asserts that the complexity and importance of this proceeding are such that he should be allotted a total of two hours and 30 minutes for the presentation of his argument and rebuttal. However, no showing has been made that this case differs significantly from other cases involving character qualifications issues. Under these circumstances, we are convinced that a total of 45 minutes will afford Hernreich a full opportunity to present his argument and rebuttal.

3. Accordingly, IT IS ORDERED:

(a) That the Motion for Acceptance of Additional Pleading filed by Hernreich on November 29, 1973, IS GRANTED only to the extent that official notice is taken of Hernreich's intention to rely on certain recent cases set forth in his additional briefs, and it IS DENIED in all other respects;

(b) That the Request for Oral Argument filed by Hernreich on July 30, 1973, IS GRANTED as reflected in this Order;

(c) That oral argument IS SCHEDULED before the Commission, *en banc*, at 9:30 a.m., on April 11, 1974.

(d) That the parties wishing to participate in the oral argument SHALL FILE a written notice of intention to appear and participate within five (5) days after the release of this Order; and

(e) That counsel for Hernreich may reserve part of his time for rebuttal and the time allowed for argument and the order of appearance SHALL BE as follows: George T. Hernreich, 45 minutes; American Broadcasting Companies, Inc., 15 minutes; Chief, Broadcast Bureau, 30 minutes.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

45 F.C.C. 2d

104-028—74——5

F.C.C. 74–181

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LAUREL CABLEVISION INC., TORRINGTON, LITCHFIELD, WATERTOWN, AND THOMASTON, CONN.	CAC–906/CSR–247 (CT021) CAC–907/CSR–248 (CT022) CAC–908/CSR–249 (CT023) CAC–909/CSR–250 (CT024)
NORTHWEST CABLEVISION, INC., WINCHESTER, CONN.	CAC–1055 (CT036)
NEW MILFORD CABLE VISION CO., NEW MILFORD AND BRIDGEWATER, CONN.	CAC–1068 (CT037) CAC–1069 (CT038)
For Certificates of Compliance	

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 26, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. Laurel Cablevision, Inc., Northwest Cablevision, Inc., and New Milford Cable Vision Company, have filed applications for certificates of compliance to begin cable television service at the above-captioned communities, which are located within the Hartford-New Haven-New Britain-Waterbury television market (#19). The systems propose to offer subscribers the following television broadcast signals: [1]

WHNB–TV (NBC, Channel 30) New Britain, Connecticut.
WTIC–TV (CBS, Channel 3) Hartford, Connecticut.
WHCT–TV (Ind., Channel 18) Hartford, Connecticut.
WEDH (Educ., Channel 24) Hartford, Connecticut.
WTNH–TV (ABC, Channel 8) New Haven, Connecticut.
WATR–TV (NBC, Channel 20) Waterbury, Connecticut.
WCBS–TV (CBS, Channel 2) New York, New York.
WNBC–TV (NBC, Channel 4) New York, New York.
WNEW–TV (Ind., Channel 5) New York, New York.
WOR–TV (Ind., Channel 9) New York, New York.
WPIX (Ind., Channel 11) New York, New York.

[1] According to the FCC Forms 325 submitted by the cable systems, population is approximately as follows: Torrington, 30,830; Litchfield, 3,500; Watertown, 15,000; Thomaston, 7,000; Winchester, 11,000; New Milford, 14,600; and Bridgewater, 1,200.

The Laurel systems each will have a 28 channel capacity. Northwest's system will have a capacity of 36 channels. New Milford will be capable of providing 35 channels on each system. Each system will provide all required access cablecasting services.

In addition, Laurel and Northwest propose to carry the following signals:

WHYN–TV (ABC, Channel 40) Springfield, Massachusetts.
WWLP (NBC, Channel 22) Springfield, Massachusetts.
WSMW–TV (Ind., Channel 27) Worcester, Massachusetts.

Northwest also proposes to carry: [2]

WTVU (CP, Channel 59) New Haven, Connecticut.

New Milford proposes to carry the following additional signals:

WABC–TV (ABC, Channel 7) New York, New York.
WNYC–TV [3] (Noncommercial, Channel 31) New York, New York.
WNET (Educ., Channel 13) Newark, New Jersey.
WXTV (Spanish Language, Channel 41) Paterson, New Jersey.
WNJU–TV (Spanish Language, Channel 47) Linden, New Jersey.
WSBK–TV (Ind., Channel 38) Boston, Massachusetts.

Objections and/or petitions for special relief have been filed against each of the referenced applications by Connecticut Television, Inc., licensee of Station WHNB–TV Capital Cities Broadcasting Corporation, licensee of Station WTNH–TV, filed a petition for special relief directed against Laurel's applications, and the Connecticut Educational Television Corporation, licensee of Station WEDH, filed an opposition directed against Northwest's proposed carriage of Station WNET.[4] The cable systems have replied.

2. In its oppositions, Connecticut Television argues that notices of proposed cable television operations filed by the applicants pursuant to former Section 74.1105 of the Rules were premature because of alleged invalidity of the then-existing franchises, and therefore the systems are not entitled to grandfathered status. We have previously considered the effect of the Connecticut franchising procedures on notifications filed pursuant to former Section 74.1105 and have determined that consistent carriage proposals in such notices are, in fact, grandfathered pursuant to Section 76.65 of the Rules. *Valley Cable Vision, Inc.*, FCC 73–1246, 44 FCC 2d 232 (1973). Only the proposed carriage of WWLP and WHYN–TV by Laurel and Northwest and of WABC–TV by New Milford would be inconsistent with the current rules if their carriage is not grandfathered. We find each of these signals to be grandfathered on the respective systems except WHYN–TV on Laurel's Watertown system. At the time of Laurel's Section 74.1105 notification, Watertown was not within the predicted Grade B contour of WHYN–TV. Although subsequently WHYN–TV enlarged its Grade B contour to include this community, no revised Section 74.1105

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[2] Northwest also proposed to carry the signal of Station WUHF–TV (CP, Channel 61) Hartford, Connecticut. However, the station's construction permit expired on October 1, 1970, and, subsequently, on April 30, 1971, the construction permit was cancelled and the call letters deleted. Thus, Northwest's request for this signal is moot.

[3] Carriage of this signal will be authorized in accordance with our opinion in *Valley Cable Vision, Inc.*, 44 FCC 2d 232 (1973).

[4] Objections directed to the franchises awarded to the subject cable systems were filed by Broadcast Plaza, Inc., licensee of Station WTIC–TV, and Connecticut Television, Inc. These objections have been considered previously and were denied in *Valley Cable Vision, Inc.*, 38 FCC 2d 959, *recons. denied*, 40 FCC 2d 191 (1972).

notices were filed to reflect this change and, therefore, we cannot afford grandfathered status to that signal in Watertown.[5]

3. Connecticut Television and Capital Cities seek special relief in the form of specialized carriage and exclusivity rules. Connecticut Television has filed the same request for relief in response to each application filed to begin cable service in Hartford, New Haven, Tolland, Middlesex, and Litchfield Counties.[6] Capital Cities has filed similar requests for relief in response to many, but not all, of the applications for service within this geographic area. Both Connecticut Television's and Capital Cities' requests have been considered on the merits previously and were denied in *Telesystems Corporation*, FCC 74–160, —— FCC 2d —— (released February 22, 1974). For the reasons discussed in that Memorandum Opinion and Order, we will deny the subject petitions for special relief.[7]

4. Connecticut Educational Television Corporation (CETC) objects to the proposed carriage of Educational Station WNET on the New Milford systems. CETC is concerned that the carriage of this signal will have an adverse impact on its ability to raise contributions, resulting in an impairment of its statewide service. CETC has consistently opposed carriage of out-of-state educational signals on any Connecticut cable system, even where such signals are local to the system, as is the case here. In no case has CETC presented factual evidence of economic harm that persuades us that a departure from our carriage rules is appropriate. See e.g., *Bridgeport Community Antennae Television Company*, FCC 73–1341, —— FCC 2d —— (released January 8, 1974). We, therefore, must reject CETC's arguments.

In view of the foregoing, the Commission finds that a grant of the above-captioned applications would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Objections of Connecticut Television" and "Petition[s] for Special Relief" filed by Connecticut Television, Inc., directed against the applications filed by Laurel Cablevision, Northwest Cablevision, and New Milford Cable Vision ARE DENIED.

IT IS FURTHER ORDERED, That the "Petition[s] for Special Relief" filed by Capital Cities Broadcasting Co. directed against Laurel Cablevision's applications ARE DENIED.

IT IS FURTHER ORDERED, That the "Objection to Applications for Certificates of Compliance," filed by Connecticut Educational Television Corporation directed against New Milford Cable Vision's applications ARE DENIED.

IT IS FURTHER ORDERED, That the applications for certificates of compliance (CAC–906, 907, 909) filed by Laurel Cablevision, Inc., the application (CAC–1055) filed by Northwest Cablevision, Inc., and the applications (CAC–1068, 1069) filed by New Milford Cable

[5] Cf. *Cedar Rapids Television Co. v. Federal Communications Commission*, 387 F. 2d 228 (D.C. Cir., 1967).

[6] According to Connecticut Television, these counties comprise the Hartford "Area of Dominant Influence (ADI)".

[7] On February 12, 1974, Connecticut Television filed a "Request for Withdrawal" of their petitions for special relief. However, because we have rules on the merits of their arguments in *Telesystems Corporation, supra.*, we deem it appropriate to rule on those arguments herein.

Vision Company ARE GRANTED, and appropriate certificates of compliance will be issued.

IT IS FURTHER ORDERED, That the application for certificate of compliance (CAC–908) filed by Laurel Cablevision, Inc. for its proposed operations in Watertown, Connecticut IS GRANTED to the extent reflected in Paragraph 2, and an appropriate certificate of compliance will be issued.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-186

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF MIAMI RADIO, INC., LICENSEE OF RADIO STATION KGLC, MIAMI, OKLA.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated September 13, 1972, addressed to Miami Radio, Inc., licensee of Radio Station KGLC, Miami, Oklahoma, and (2) the licensee's response of October 13, 1972 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for $1,500 (issued pursuant to Section 503(b) of the Communications Act of 1934, as amended) indicated that in violation of Section 73.93(a) of the Commission's Rules the station was operated without a first-class radiotelephone operator on duty in charge of the transmitter at the following times:

December 7, 1971, 12:00 midnight to 6:30 a.m.
December 8, 1971, 12:00 midnight to 6:00 a.m.
December 9, 1971, 12:00 midnight to 6:00 a.m.
December 10, 1971, 12:00 midnight to 6:00 a.m.
December 11, 1971, 12:00 midnight to 8:00 a.m.
December 12, 1971, 12:00 midnight to 8:00 a.m.

Further, the Notice indicated that on the same dates and during the same hours listed above an operator holding a third-class radiotelephone operator's license was in charge of the transmitter,[1] who failed to sign on or off the operating log in violation of Section 73.111(a) of the Commission's Rules. Additionally, the Notice indicated that field intensity measurements had not been made each seven days at the monitoring points, as required by the station license, during the period October 15 to November 15, 1971 and during the week ending November 22, 1971.

3. In response to the Notice of Apparent Liability the licensee contended that the violations were not willful and that corrective action had been taken. Licensee stated: "We are [now] aware that some of our ex-employees did violate a number of the commission's rules. However, we can assure the commission, that the licensee did not

[1] Station KGLC is licensed to operate on 910 kilohertz with a power of one kilowatt, directional antenna. At the time of the violations, Section 73.93(a) of the Commission's Rules required that standard broadcast stations be operated by first-class radiotelephone operators while operating with directional antennas.

willfully allow these violations, and as soon as we were aware of the happening the employees were terminated." The licensee requested reduction in the amount of the forefeiture, stating:

> In conclusion we feel there is justification by the Commission to cite Miami Radio Inc., licensee of KGLC Radio with an apparent liability. We feel that since the time of the initial investigation and receipt of your letter dated September 13, 1972, notifying us of the apparent liability, the F.C.C. had reduced the requirements of D–A station operators from first class license to third class license with broadcast endorsement, and the fact, since the initial investigation, new policies and procedures and new qualified personnel will insure KGLC Radio will operate within the rules and regulations of the Commission, re-consideration by the Commission would be in order and perhaps the apparent liability for forfeiture could justifiably be reduced from the present $1.500.00 assessment.

4. We find that the licensee repeatedly violated Section 73.93(a) of the Commission's Rules in that the station was operated without a first-class radiotelephone operator on duty in charge of the transmitter; that it repeatedly violated Section 73.111(a) of the Rules in that the operator failed to sign on or off the operating log; and that it repeatedly failed to observe the terms of its station license by failing to make required field intensity measurements, all as set forth above. Having found the violations to have been repeated it is unnecessary that we make an additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. As we have stated in the past, licensees will not be excused for past violations by reason of subsequent corrective action. *Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). As for mitigation, we are not persuaded to reduce the amount of the forfeiture. Licensees must comply with the Rules which are in force at the time and will not be excused because their conduct would not have been a violation under a later revision of the Rules. *Hanson R. Carter*, 23 FCC 2d 511 (1970).

5. In view of the foregoing, IT IS ORDERED, That Miami Radio, Inc., the licensee of Radio Station KGLC, Miami, Oklahoma, FORFEIT to the United States the sum of one thousand five hundred dollars ($1,500) for repeated violation of Sections 73.93(a) and 73.111(a) of the Commission's Rules, and for repeated failure to observe the terms of the station license. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for mitigation or remission of forfeiture may be filed within thirty days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 74-180

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	Docket No. 19944
CEASE AND DESIST ORDER DIRECTED AGAINST:	CSC-68
MINNESOTA CATV, INC., MANKATO, MINN.,	MN002
NORTH MANKATO, MINN.	MN003

ORDER TO SHOW CAUSE

(Adopted February 21, 1974; Released February 26, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On October 16, 1973, Hubbard Broadcasting, Inc., licensee of Station KSTP-TV, St. Paul, Minnesota, filed a "Petition for Order to Show Cause" asking that an Order to Show Cause be directed against Minnesota CATV, Inc., operator of a cable television system at Mankato, Minnesota, for its alleged refusal to provide network program exclusivity protection in accordance with Section 76.91 of the Commission's Rules.[1] On November 5, 1973, Hubbard filed a "Supplemental Statement to Petition for Order to Show Cause" asking that such Order to Show Cause also be directed against Minnesota CATV's cable television system operating at North Mankato, Minnesota. Minnesota CATV has not responded to either pleading.

2. Minnesota CATV's systems at Mankato and North Mankato, both in operation for nearly 18 years and located in the Mankato smaller television market, provide approximately 10,500 subscribers with the following television broadcast signals:

KEYC-TV (CBS) Mankato, Minnesota.
KAUS-TV (ABC) Austin, Minnesota.
KROC-TV (NBC) Rochester, Minnesota.
WCCO-TV (CBS) Minneapolis, Minnesota.
KMSP-TV (ABC) Minneapolis, Minnesota.
WTCN-TV (Ind.) Minneapolis, Minnesota.
KSTP-TV (NBC) St. Paul, Minnesota.
KTCA-TV (Educ.) St. Paul, Minnesota.

[1] Section 76.91 of the Commission's Rules provides, in pertinent part, as follows:
"(a) Any cable television system operating in a community, in whole or in part, within the Grade B contour of any television broadcast station, or within the community of a 100-watt or higher power television translator station, and that carries the signal of such station shall, on request of the station licensee or permittee, maintain the station's exclusivity as an outlet for network programming against lower priority duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in §§ 76.93 and 76.95.
"(b) For purposes of this section, the order of priority of television signals carried by a cable television system is as follows: (1) First, all television broadcast stations within whose principal community contours the community of the system is located, in whole or in part; (2) Second, all television broadcast stations within whose Grade A contours the community of the system is located, in whole or in part; (3) Third, all television broadcast stations within whose Grade B contours the community of the system is located, in whole or in part;"

The predicted Grade B contour of Station KSTP–TV, an NBC affiliate, encompasses—in whole or in part—both communities served by Minnesota CATV. The predicted Grade B contour of Station KROC–TV, Rochester, Minnesota—the other NBC affiliate carried on the systems—falls short of each community.

3. It appears that Station KSTP–TV is entitled to simultaneous network program exclusivity on the systems operated by Minnesota CATV. Hubbard asserts that despite a request for exclusivity it submitted to Minnesota CATV on July 10, 1973, and the filing of the above-described pleadings, the systems' operator has continued to carry duplicating network programming of Station KROC–TV. Hubbard maintains, and supports by affidavit, that it has provided Minnesota CATV, on a continuing basis since July 10, 1973, proper programming notification. On December 28, 1973, the Chief, Cable Television Bureau, mailed a certified letter to Minnesota CATV's owner, American Television & Communications Corporation, which referred to the requests for Order to Show Cause. The letter noted Minnesota CATV's failure to file a responsive pleading, and asked that any forthcoming pleading be filed within 20 days of the date of the letter. No response was filed. On January 30, 1974, Hubbard submitted a letter to the Commission which: (a) noted the systems' owner's failure to respond to the Commission correspondence; and (b) requested immediate issuance of an Order to Show Cause. In view of Minnesota CATV's alleged failure to provide required exclusivity protection, and its failure to respond both to formal pleadings and a Commission inquiry, we believe it is appropriate to issue the requested Order to Show Cause.

Accordingly, IT IS ORDERED, That pursuant to Sections 312(b) and (c) and 409(a) of the Communications Act of 1934, as amended, 47 U.S.C. 312(b) and (c) and 409(a), Minnesota CATV, Inc. IS DIRECTED TO SHOW CAUSE why it should not be ordered to cease and desist from further violation of Section 76.91 of the Commission's Rules and Regulations on its cable television systems at Mankato and North Mankato, Minnesota.

IT IS FURTHER ORDERED, That Minnesota CATV, Inc., IS DIRECTED to appear and give evidence with respect to the matters described above at a hearing to be held at Washington, D.C. at a time and place before an Administrative Law Judge to be specified by subsequent Order, unless the hearing is waived in which event a written statement may be submitted.

IT IS FURTHER ORDERED, That Hubbard Broadcasting, Inc. and Chief, Cable Television Bureau ARE MADE parties to this proceeding.

IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of this Order by Certified Mail to Minnesota CATV, Inc.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-34

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 1, 2, 21, AND 43 OF THE COMMISSION'S RULES AND REGULATIONS TO PROVIDE FOR LICENSING AND REGULATION OF COMMON CARRIER RADIO STATIONS IN THE MULTIPOINT DISTRIBUTION SERVICE	Docket No. 19493

REPORT AND ORDER

(Adopted January 9, 1974; Released January 18, 1974)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN, REID, WILEY AND HOOKS CONCURRING IN THE RESULT.

1. On April 26, 1972, we issued in this proceeding a *Notice of Proposed Rule Making* (34 FCC 2d 719) for the purpose of promulgating new rules for the licensing and regulation of common carrier radio stations in the Multipoint Distribution Service (MDS). Heretofore, the microwave radio frequencies (2150–2160 MHz) used for common carrier omnidirectional transmission have been included in the rules of the Point-to-Point Microwave Radio Service.[1] Because of recent widespread interest in this band, however, we decided that new rules were necessary to better meet the requirements of this service.

2. Comments were filed by 27 parties: 17 MDS applicants[2]: 3 telephone/specialized common carriers—American Telephone and Telegraph Company (AT&T), Hawaiian Telephone Company and Microwave Communication, Inc. (MCI); 2 equipment manufacturers—Aventek, Inc. and Varian/Micro-Link (Varian); and 5 other interested parties—The Communications Corporation, TVC of California, Inc., Multipoint Microwave Common Carrier Association (MDS Association), Black Efforts for Soul in Television (BEST) and Nugent S. Sharp. Reply comments were filed by: AT&T, BEST, Jacksonville Radio Dispatch, Microband, MDS Association, Microwave Transmission Corp., Pennsylvania Radio Telephone Corp., Taft Broadcasting, TelePrompTer Corporation, Two-Way Radio of Caro-

[1] *See, Memorandum Opinion and Order re Section 21.703(g)*, 35 Fed. Reg. 12462, 19 RR 2d 1847 (1970), and *Report and Order* in Docket No. 14712, 39 FCC 834 (1962).

[2] Athena Communications Corporation; Buckeye Cablevision, Inc.; Chicago Communication Service, Inc.; Colony Communication, Inc.; Dayton Communications Corporation; Eastern Microwave, Inc.; International Television Corporation; Michigan Tele-Communications Services, Inc.; Micro TV, Inc.; Microband Corporation of America (Microband); Microwave Transmission Corp.; Midwest Corporation; Multi-Communication Service, Inc.; Radio Call, Inc.; Paul E. Taft d/b/a Taft Broadcasting Company (Taft Broadcasting); Western Tele-Communications, Inc.; and WHP, Inc.

lina, Inc., Services Unlimited, Inc., Varian, Nugent S. Sharp and Zig Grobowski.[3]

3. Among other things, we requested comments on the applicability of the "antisiphoning" rules to MDS. However, subsequent to the *Notice of Proposed Rule Making*, we decided that this issue should be considered from a broader perspective. Consequently, comments pertaining to "antisiphoning" will be considered in connection with the proceeding in Docket No. 19671.[4]

4. With respect to other matters, the majority of the comments favored loose regulation, believing that industry experimentation and operational experience are necessary prerequisites to more comprehensive rules. In general, the comments supported the proposed rules, but some questions were raised concerning: the limitations on production facilities, encroachment on the 2160–2180 MHz band, allocation of a second channel, low transmitter power, transmission standards, antenna height restrictions, receiving antenna standards, carrier ownership of receiving facilities, and reporting requirements. These matters, and others believed to be of greater significance, are discussed below. We have considered also numerous other suggestions and proposals involving matters of less substantial nature, but rather than specifically discussing them here, we have modified the rules as considered appropriate.

DESCRIPTION OF MDS

5. Before proceeding to discuss the various matters, a brief description of MDS might provide a helpful background. A MDS system may be described as consisting basically of a fixed station transmitting more or less omnidirectionally to numerous fixed receivers with directive antennas. The intelligence which is transmitted is supplied by the subscriber and may consist of private television, high speed computer data, facsimile, control information, or other communications capable of radio transmission. The transmission is one-way in that the audience can not use the system to respond to the communication, although return voice communications may be obtained by simultaneous use of telephone lines. The range of the transmission (usually up to about 25 miles) depends upon the power of the transmitter, the size and characteristics of the receiving antenna and the existence of a line of sight path between transmitter and receiver. The transmitted signal is: (1) intercepted by a directive parabolic or horn type antenna erected at each customer selected receiving location; (2) converted from the microwave frequency to selected lower frequency by a down converter; (3) passed through a decoder which senses an address code and activates the receiver if the address code corresponds to that of the receiving site; and (4) displayed upon an unused channel of a standard television receiver (or fed to a data terminal, facsimile device, etc. in the case of a nontelevision signal). If greater security is desired for the

[3] Jacksonville Radio Dispatch, Pennsylvania Radio Telephone Corp., Services Unlimited, Inc. and Two-Way Radio Carolina, Inc. claim that prior state certification of MDS facilities should be a prerequisite to Commission authorization. This matter was considered in *Midwest Corp., et al.*, 38 FCC 2d 987 (1973).

[4] *Notice of Inquiry and Notice of Proposed Rule Making*, Docket No. 19671, 39 FCC 2d 527 (1973).

signal than provided by the address code and decoder, the signal may be scrambled by means of such techniques as signal frequency inversion, band shift, band split, time division scramble, or masking the signal in noise. A device to unscramble the signal would be employed after the decoder.

ELIGIBILITY AND SERVICE

6. The rules as proposed prohibit carriers from being involved "to any substantial degree" in the organization or production of program material, and from providing more than fifty per cent of their service to affiliated subscribers. The comments generally agreed with these proposals, recognizing that a common carrier offers a transmission service for hire and can not control program material or serve primarily its other business interests. However, some comments, such as those of Michigan Tele-Communications Services, suggested that our proposal should be clarified to allow studio facilities to be made available for the use of subscribers. We have made some revisions to the rules in this regard, but it is to be noted that it is difficult, if not impossible, to draft concise language to cover all situations that may occur. However, the discussion set forth below should prove helpful in clarifying our intent.

7. In essence, a carrier's primary responsibility is to provide services necessary to, and ancillary to, the provision of the communication service offered, without affecting or influencing the content of the information communicated. Put more simply, a carrier's responsibility is to provide a "pipeline" pursuant to his tariff for the transmission of customer provided information between two or more points as specified by the customer. In the context of MDS, we see no harm in a practice whereby a carrier provides video tape equipment and a studio with television cameras and other equipment since such facilities are a necessary part of the communications link. The carrier may provide technical assistance and advice in the use of such facilities, including the operation of the equipment. However, such assistance must not in any significant way affect the content of the information to be transmitted. If a customer lacks the expertise or sophistication to produce the desired programming, the carrier should refer him to a competent producer that is unrelated to the carrier.

8. At this point, two other comments may be appropriate. First, in order that there may be no doubt regarding the meaning of "affiliated" or "related" as used in Section 21.900 *et seq.* we will construe these terms as we do in Section 21.700 to mean any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship.[5] Section 21.903(b) prohibits the rendering of service to any affiliated entity whenever the total hours of service rendered to related customers exceeds the total hours of service rendered to unrelated customers during any calendar month. Section 43.72 will require annual reports of service to affiliated or related subscribers, and we will consider these reports in conjunction with the renewal of li-

[5] *See, Community Antenna Television Systems* (Docket 15586), 1 FCC 2d 897, 903 (1965).

censes for this service. Secondly, we are somewhat concerned that a MDS station may become largely dedicated to the use of a specific subscriber or type of service by block sales of transmission time. Since the amount of frequency spectrum allocated for this service is severely limited, a requirement to restrict the amount of service that can be made available to a large subscriber may be desirable if there develops a significant unfilled demand for service by other potential customers. At the present time, however, such a rule seems premature because of the newness of the industry and authorization of a second MDS channel. We trust that the carriers will recognize their standing obligation to provide reasonable and nondiscriminatory access and that they will imaginatively exploit the technical possibilities of MDS to meet fully diverse requirements for service.[6]

THE SECOND CHANNEL

9. A large majority of the comments supported the desirability of a second channel with little discussion as to its technical feasibility. Among the reasons given for a second channel were the large number of MDS applicants, the unmet need for local distribution of interstate specialized communications, diversification of ownership and the present relatively light use of the 2 GHz band for point-to-point purposes. On the other hand, noting that the public demand for this service is somewhat speculative, some questioned the need for additional spectrum and the technical feasibility of adjacent MDS channels. AT&T, Avantek, Hawaiian Telephone, MCI and Microwave Transmission Corp. argued that the 2160–2162 MHz portion of the 2160–2180 MHz band should remain allocated only for point-to-point uses in order to meet the new spectrum demands caused by the authorization of specialized common carriers and recently developed single sideband AM microwave equipment (which may double the voice channel capacity in the 2 GHz band). Moreover, Nugent S. Sharp and Varian question whether an adjacent second channel is technically feasible. Sharp cites cases of adjacent channel interference between Instructional Television Fixed Service (ITFS) stations, and Varian doubts whether the selectivity of the receiver's down converter could be improved to prevent reception of a discernible signal from an adjacent channel.

10. Considering all of the comments in this regard, we have decided that the public interest would be better served by providing for a second MDS channel as proposed. In view of the varied communication needs which may be met by this type of facility, the rather minimal impact on the 2 GHz point-to-point band, and considering that 2160–2162 MHz is usually paired with the 2110–2112 MHz band (which may be unavailable because of other shared uses [7]), we think that the proposed usage is a reasonable compromise between competing interests for the use of this part of the spectrum. Consequently, Section 21.901

[6] MDS is not limited to television transmission and should be capable of many diverse forms of transmission such as the omnidirectional distribution of high speed computer data, audio, control signal, facsimile, etc. However, the transmitters that have been proposed to date for use in MDS are type accepted only for television (video and associated audio) and employ vestigal sideband, amplitude modulation (emission A5C) for the visual signal and frequency modulation (emission F3) for the accompanying aural signal. Transmitters will have to be type accepted before they can be used for the transmission of other types of signals.

[7] *See* the Table of Frequency Allocations in Part 2 of our Rules and the *Further Notice of Proposed Rulemaking* in Docket No. 19494, 34 FCC 2d 696 (1972).

will allow allocation of two MDS channels,[8] the second to be located either within the band 2156–2160 MHz (designated as channel 2A), or within the band 2156–2162 MHz (designated as channel 2) depending on whether the station is located within one of the cities listed in Section 21.901(c). While we originally proposed a second 6 MHz channel for the top 50 standard metropolitan statistical areas, subsequent study revealed that some of these metropolitan areas are too close to accommodate stations in both cities.[9] Accordingly, we have revised the proposed rules to specify by name the largest 50 metropolitan areas which are believed to be geographically capable of a second allocation. Where two or more statistical metropolitan areas have been consolidated (e.g., New York City—Newark—Patterson), we have listed the largest city for purposes of identifying the area. However, this does not mean that a second channel station for the consolidated metropolitan area necessarily has to be located in such city.

11. With respect to the technical feasibility, our investigation indicates that two separate stations should be able to operate on adjacent channels in the same city without destructive interference, provided that the facilities are carefully engineered. Considering the case of a television signal, we believe that the average VHF–UHF television receiver offers satisfactory adjacent channel performance if the adjacent channel signals are of approximately equal strength at the antenna input terminals of the set. For example, this requirement can be realized usually if the transmitting antennas for adjacent channels have the same effective radiated power, are cross polarized, and are located at the same elevation and geographical coordinates. Adjacent channel operation may still be possible even where the signals are not of the same approximate strength if the receiving equipment is engineered to be more selective. However, if the transmitted signals are not substantially identical in strength, both carriers would need to employ more sophisticated receiving equipment. Since such equipment would involve substantially higher costs, the interests of the carriers and the public would encourage co-location of transmitting facilities wherever possible.

12. Another problem which a second channel would pose concerns the security of the transmitted program material. It is likely that the average MDS down converter at the receive location would not be selective enough to supply the television receiver with a signal which would effectively exclude the undesired adjacent channel. While the television receiver should have enough tuning selectivity to preclude interference by the undesired adjacent channel, it is likely to have the fine tuning capability of receiving a somewhat degraded adjacent channel even if the system is designed so that the adjacent channel is down converted to a VHF frequency for which the television receiver is not detent tuned.[10] Therefore, it would be possible for a subscriber

[8] While MDS is not limited to television, the channel terminology is a convenient method of referring to the frequency allocation.

[9] Under normal application processing policies, and absent other positive information to the contrary, it is presumed that a proposed station within 25 miles of another station would create harmful interference but that two stations located 50 miles or more apart would not.

[10] That is, at the band edges adjacent to channels 2, 4, 5, 6, 7 and 13.

to tune his receiver from the assigned channel to view the programming on the adjacent channel. This is not considered to be a likely occurrence since it would be feasible only when the receiving facilities are activated for the intended signal.[11] Absolute program security can be obtained (at additional cost) by the use of scrambling-unscrambling devices. For the majority of potential subscribers, we do not believe that transmission security is critical enough to warrant mandatory scrambling devices. However, we do believe that potential customers should be advised of the degree of security offered by a carrier at his standard tariff rates. If such security is not adequate for the customer's needs, the carrier should offer the necessary scrambling or other security measures.

13. In order to effectuate authorization of a second adjacent channel we have decided upon the following policies. First, we have decided to require the licensee, permittee, or applicant for the first channel, and the applicant for the second channel to cooperate fully and in good faith to resolve potential interference and program security problems. Because an adjacent second channel requires careful engineering, we recognize the superior strategic position that the licensee, permittee, or applicant for the first channel may be in. As noted above, the second channel applicant will probably have to design his system around the technical characteristics and location of the first channel's transmitting antenna. This first carrier then could be in a position to make it difficult for a second channel applicant to locate his transmitting antenna at the same location or nearby. Therefore, the language of proposed Section 21.902 has been clarified by new paragraphs (a), (b) and (c) to make clear that the applicants, permittees and licensees for the first channel sought must engineer their stations to anticipate, and to allow for, the successful operation of an adjacent channel. Of course, the applicant for the second channel sought will be expected to demonstrate that his system is designed so that significant interference will not occur with respect to the first MDS channel and to point-to-point facilities in the 2160–2162 MHz band. However, whenever the adjacent channel is requested, the licensee, permittee or applicant for the first channel and the applicant (or applicants) for the second channel will be required to cooperate fully and in good faith to resolve potential interference and program security problems. Furthermore, we have included in the Rules a prohibition against any lease, contract or other arrangement which would prevent locating a competing carrier's facilities at any given site so to preclude successful second channel operation. We also wish to make clear that we will closely scrutinize for anticompetitive motives any activity of an MDS carrier or applicant to use unreasonably the Commission's processes either to delay or oppose action on an application for competing facilities, or to refuse reasonable cooperation to remove technical conflicts. We anticipate that carriers will cooperate fully and in good faith to allow successful adjacent channel operation. However, if this should prove not to be the case, we will not hesitate to suggest reasonable engineering com-

[11] In normal operation we will expect the carrier to employ a decoder to prevent activation of the down converter except when that location is scheduled to receive a transmission.

promises or to prescribe reasonable requirements for the receiving equipment of both carriers in order to allow successful adjacent channel operation (*see* Section 21.902(b)).

14. Secondly, we have decided upon a policy in support of competitive entry and fair competition. In the *Notice of Proposed Rule Making*, we indicated that we would not initially authorize any one user more than one 6 MHz channel in a given area. There was little negative comment on this policy. Most comments, such as those of Microband, recognized "that competition is the spur to creativity and better service." BEST urged the encouragement of diversification of ownership by adoption of our specialized common carrier policy of maximizing carrier competition.[12] Microwave Transmission Corporation, on the other hand, opposed second channel grants simply for purposes of diversification of ownership or where the economic success of the first carrier is not assured. Upon evaluation of the comments, we believe a policy in support of competitive entry and fair competition in this service is particularly applicable. There appears to be little economic benefits to be gained by giving one entity a two channel monopoly in any community. A second channel will require duplicate transmitting, receiving, and to some degree, studio facilities. Of course, there may be some economies of scale in marketing, management and transmitter site costs. However, we are of the opinion that the public interest will be better served by the spur of competition which will encourage service improvements and operational innovations.

15. Therefore, we have decided to expand the proposed policy somewhat and include it in the Rules as Section 21.901(d). This rule will prohibit a permittee or licensee from filing an application for an additional channel in the same city unless he has operated an existing facility for a minimum of one year from the date of initial public service, and he can demonstrate that there exists a public demand for additional service which is not likely to be satisfied by a competing MDS carrier. The purpose of this rule is to encourage competition and to prevent an existing carrier from delaying the entry of a competitor by filing a mutually exclusive application. From time to time there may arise exceptional circumstances where the public interest would be better served by a waiver of this one year rule. However, it would be up to the applicant to fully support and justify such a waiver. Furthermore, an application requiring a waiver would not be accepted for filing until the waiver has been granted by the Commission.

TRANSMITTER POWER

16. In our *Notice* we tentatively decided to control potential interference problems by limiting the transmitting power, in terms of effective radiated power (ERP), to one hundred (100) watts. The MDS Association stated that it would accept this limitation, but it hoped that we would allow waivers under specifically described circumstances. The majority of the comments, however, favored higher trans-

[12] BEST also urged that we examine problems of duopoly, cross ownership and concentration of control. We think that such a study is premature at this time because of the lack of industry development and the regulated nature of MDS.

mitter power, arguing that increased power would render the signal less vulnerable to atmospheric and topographic disturbances, would allow cheaper and less obstrusive receiving antennas, and would not increase the threat of harmful interference. On the other hand, AT&T claims that, while increased power may not cause greater interference between MDS stations, higher power would increase interference potential with point-to-point stations operating in the 2160–2162 MHz band.

17. After considering all of the general comments on this matter, we have decided to retain the same approximate power limitation expressed in terms of transmitter output power (i.e. 10 watts), but to allow increased output power up to 100 watts where an applicant can demonstrate a clear need for increased power and the lack of harmful impact on other facilities.[13] As we stated in the *Notice of Proposed Rulemaking*, omnidirectional assignments must be made with exceptional care in order to obtain maximum utilization of the limited spectrum available. Consequently, as a general rule, the transmitter power of a station should be limited to the minimum power necessary to adequately serve the area of intended operation. This is considered necessary because higher power tends to increase the possibility of interference with point to point stations sharing this band, complicates the allocation of an adjacent second channel, and may interfere with the authorization or development of nearby MDS stations. Under Section 21.904(b) we will examine two areas in evaluating requests for higher power.[14] The first will be potential interference. The most serious concern about higher power is potential harmful interference with (or blockage of development of) other MDS stations, point-to-point stations,[15] or Canadian stations. Consequently, an applicant requesting higher power must demonstrate that he considered all potential adverse interference problems with other stations. Secondly, an applicant must demonstrate the reasons why higher power will directly benefit the public interest.

TELEVISION TRANSMISSION STANDARDS

18. In our *Notice* we proposed to apply to MDS television transmission many of the technical requirements of broadcast television. Several of the comments cautioned that the broadcast technical standards may not be flexible enough to allow experimentation, scrambling, or custom service. These comments appear to have some merit. Accordingly, we have revised Section 21.907 to provide for somewhat greater flexibility. While some transmission standards are necessary to insure service quality, it appears that MDS will serve primarily sophis-

[13] While our *Notice* spoke of transmitting power in terms of effective radiated power, upon further reflection we have decided that it is more practical to reference transmitter output power. However, if an applicant proposes a high gain transmitting antenna or directional transmission pattern to minimize interference potential, some ERP limitation may be required.

[14] Request for higher power also requires considerably more processing time. Consequently, we have added to Section 1.1113 a grant fee of $50.00 to help defray the additional expenses involved.

[15] Technically, only a 6 MHz second channel station could affect point to point facilities in the 2160–2162 MHz band. However, since the second channel would usually have to operate at the same power as the first, applicants for higher power for the first channel in the top 50 cities should consider the possible indirect affect on point to point stations.

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ticated commercial and institutional customers who should be free to contract for service meeting their specific transmission and security requirements. Such requests should be knowledgeable, however, based upon the description of the service contained in the carrier's tariff. Therefore, our approach will be to require carriers (that use a full 6 MHz channel) to be able to provide one type of monochrome and/or color television transmission which meets the broadcast standards. This will remain our standard for the type acceptance of equipment intended for television transmission. In addition, the carrier may provide other types of television transmission (e.g., high resolution pictures, slow scan, various color standards, containment of other information in discrete portions of the television signal, etc.), if the technical specifications and parameters of such service (including comparison to the standard service) are fully described in the tariff.

ANTENNAS

19. The *Notice* proposed that transmitting antennas be primarily omnidirectional and elevated no higher than necessary. We also indicated that elevated receiving antennas were preferable to elevated transmitting antennas. The comments, however, generally suggested allowance of directional transmissions and favored higher transmitter antennas for cost, coverage and environmental reasons. These suggestions seem reasonable in view of the fact that a carrier cannot predict the precise receiving points in designing his system and must demonstrate the nonexistence of harmful interference. Accordingly, we have revised Section 21.906 to allow transmission coverage more consistent with the distribution of receiving points and to delete the preference for elevated receiving antennas. In addition, we have clarified this section to remind applicants that receiving antennas are subject to the requirements of Part 17.

RECEIVING EQUIPMENT

20. To avoid interference some comments urged that we adopt minimum standards for the directivity of receiving antennas. AT&T and Microwave Transmission Corp., for example, propose minimum side lobe suppression standards to prevent interference with point to point stations sharing the 2160–2162 MHz band. However, since this band is shared in only the top 50 cities and new point-to-point stations are prohibited from using this band within 50 miles of those cities, we do not foresee substantial interference problems requiring adoption of this proposal. Furthermore, such standards would probably preclude the use of smaller receiving antennas, adding to the cost of the service. However, while we believe that minimum receiving antenna standards are not necessary for all carriers, this does not mean that some carriers may not have to utilize higher performance antennas in order to avoid receiving interference from other stations. In essence, we believe this problem can be resolved on a case by case basis rather than by adoption of minimum standards across the board.

21. To further aid in consideration of possible frequency conflicts, Eastern proposed that carriers notify us of the location and name of

all subscribers. The MDS Association disagreed, claiming that MDS is akin to one way signaling devices and should not have to specify its receiving locations. Since a carrier must design his facilities to provide reasonable service to all potential subscribers in a given area, the resolution of potential frequency conflicts cannot be predicated on service only to specified locations. A carrier should be free and able to promptly serve all persons seeking service in his service area. Therefore, Eastern's suggestion would not be helpful. For much the same reasons, we think that licensing specific receiving sites is unnecessary, and we are removing all restrictions in this regard.[16]

22. The comments unanimously supported our proposal that the carrier control the receiver, but they differed as to whether control necessitated ownership. The majority thought that subscribers should be able to own their receivers in order to avoid receiver rent and reinstallation costs. The MDS Association, for example, believed that adequate carrier control can be assured by tariff and contract provisions. On the other hand, some comments, such as those of Microband, thought that transmission quality and security could be preserved as a practical matter only if the carrier owned all the receiving equipment. It is our view that all of the receiving equipment, with the exception of the television receiver (which we do not consider to be part of the MDS receiving equipment), require professional installation and maintenance in order to insure satisfactory quality of service and reasonable privacy of the transmission. Therefore, we conclude that they should be under the control of the carrier when he is rendering service. However, this does not mean that a customer should be precluded from owning this equipment. Therefore, we have revised the rules to require tariff provisions allowing for customer ownership of receiving equipment (except for the decoder), subject to the customer providing the type of equipment specified by the carrier and the requirement that the carrier control the installation, operation and maintenance of such equipment.

TEMPORARY FIXED STATIONS

23. The *Notice* proposed to authorize temporary fixed stations only where substantial public benefit could be shown. The majority of the comments concurred, believing that temporary fixed operations will be rare and severely limited. However, having given this matter more thorough consideration, we are of the opinion that the authorization of such facilities would create substantial problems, especially in view of the extensive demand for frequencies in this band. Potential interference is the primary problem since a temporary fixed station would make the location of other stations in the same area difficult, if not impossible, and would almost certainly preclude allocation of an adjacent channel in the same city. Moreover, we are not convinced that the need for such facilities could not be better met by other methods.

[16] Heretofore, we have specified on the face of the authorization a specific number of temporary fixed receiving facilities. This practice will be eliminated so that the carrier can respond promptly to new demands for service without further Commission authority. However, in an initial application for construction permit, the estimated cost for a number of receivers adequate to provide reasonable service to the city involved should be included.

Therefore, we will decline to authorize temporary fixed facilities in this service and Sections 21.909 and 21.910 of the proposed rules have been deleted.

STATIONS NEAR THE CANADIAN BORDER

24. Subsequent to the issuance of the *Notice of Proposed Rule Making*, it has come to our attention that proposed MDS stations located near the U.S./Canadian border may encounter international interference problems. In Canada, the band 1900–2290 MHz is allocated for wide band, point-to-point communications. Pursuant to the U.S./Canadian frequency coordination agreement, proposed assignments in many frequency bands, including the band 2150–2162 MHz, within 35 miles of the border will be formally coordinated between the two Governments.[17] As a general policy, we expect that radiation in the direction of Canada be minimized, insofar as practical, through the use of various engineering techniques such as use of directional antennas, beam tilt, careful selection of antenna sites, etc. In some instances, it may be feasible to locate the transmitter at one side of the community to be served so as to minimize the possibility of interference to and from existing Canadian assignments, utilizing available directional characteristics of transmitting and receiving antennas in the system. Further, it would be advisable for applicants considering the design of facilities to be located within the 35 mile coordination zone to determine the particulars of existing Canadian stations in the area and to coordinate informally with appropriate Canadian licensees for the purpose of avoiding harmful interference in either direction. While such prior coordination would not eliminate the need for formal coordination with the Canadian Department of Communications, it may expedite the processing of the applications and eliminate the need for major amendments at a later date.

REPORTING REQUIREMENTS

25. Only Microband, Micro TV and the MDS Association commented on our proposed reporting requirements. In general, these comments opposed revealing the names of specific subscribers and providing the number of separate occasions on which each subscriber was served. The MDS Association suggests that our report require information on the identity, affiliation and service provided to broad classes of subscribers. These suggestions seem reasonable and we have revised Section 43.72 to require instead: (a) the total number of subscribers served, (b) the total hours of transmission service and (c) the total hours of service rendered for purposes of entertainment (e.g., sports, movies, etc.), public safety (e.g., police and fire department uses), education, business training, business communication, business promotion, data transmission, and any other identified use which constituted five percent or more of the total annual use. However, specific information will be required for all affiliated subscribers.

[17] Also, there may be instances where proposed U.S. assignments beyond the 35 mile zone may be coordinated with Canada. Such coordination may be initiated if engineering studies indicate that the antenna height and effective radiated power may be capable of causing harmful interference to existing Canadian operations.

PROCESSING OF APPLICATIONS

26. In our *Notice* we stated that we would not process applications which are mutually exclusive or inconsistent with the proposed rules until finalization of this proceeding.[18] Accordingly, we will allow applicants with currently pending applications 60 days from the release date of these rules to amend their applications to reflect consistency with these final rules. In the interest of fairness, amendments necessary to bring applications into compliance with these final rules will not be considered major amendments for purposes of the cut-off rule, Section 21.30(b), provided they are filed within the 60 day period.[19] Applications not amended within the 60 day period and not consistent with these final rules will be subject to dismissal. Applications will be processed and considered in order of original filing date as they are amended (if necessary) for consistency with the rules.[20] Applications for a second 6 MHz channel will be acceptable for filing on or after the effective date of these rules.

27. Accordingly, IT IS HEREBY ORDERED, That pursuant to the authority contained in Sections 1, 2, 3, 4(i) and (j), 301, 303, 307–309 and 403 of the Communications Act of 1934, as amended, Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations ARE AMENDED, as set forth in the attached appendix, effective February 25, 1974.

28. IT IS FURTHER ORDERED, That, all pending applications not made consistent with the rules promulgated herein within sixty (60) days of the release date of this Report and Order SHALL BE SUBJECT TO DISMISSAL.

29. IT IS FURTHER ORDERED, That, Section 21.30(b) of the Rules IS WAIVED with respect to a major amendment of any currently pending application in this service only to the extent necessary to make such application consistent with the Rules herein; *Provided, however*, That such amendment must be filed within the time period specified in paragraph 26 above and that it shall not change the community to be served or create new technical conflicts with facilities proposed in nearby communities.

30. IT IS FURTHER ORDERED, That, the facilities authorized under these Rules SHALL BE SUBJECT TO ANY REQUIREMENTS that may be promulgated in the proceedings in Docket No. 19671.

31. IT IS FURTHER ORDERED, That, the proceedings in Docket No. 19493 ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[18] Despite the negative comments of Avantek, BEST and TelePrompTer, we considered settled the interim processing of applications consistent with our proposed rules. *See, Memorandum Opinion and Order* released October 3, 1972, 37 FCC 2d 444.

[19] This exception to the "cut-off rule" is strictly limited and does not include desirable changes, e.g., increased power, better transmitter sites, etc.

[20] It would be helpful for applicants with applications not requiring amendments to so notify the Commission.

APPENDIX

Parts 1, 2, 21 and 43 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. In § 1.1113, the following fee schedule is added to follow the schedule for the Local Television Transmission Service, and footnote 11 is added at the end of the schedule to read as follows:

"§ 1.1113 SCHEDULE OF FEES FOR COMMON CARRIER SERVICES.

* * * * * * *

"Multipoint distribution service

	"Filing fee	Grant fee
"Application for initial construction permit, or for modification involving relocation of station, or addition or change of frequencies, or increase in power	$100	[11] $150
Application for other modification of construction permit or license	25	25
Application for renewal of license	25	100

[11] An additional grant fee of $50 is applied to any application proposing transmitter output power in excess of 10 w."

* * * * * * *

2. In § 2.1, a new definition is added in alphabetical order as follows:

"§ 2.1 DEFINITIONS.

* * * * * * *

Multipoint Distribution Service.—A one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points determined by the subscribers."

* * * * * * *

3. In § 2.106, the bands 2150–2160 MHz and 2160–2180 MHz in columns 7 through 11 are amended and footnotes NG 23 and NG 45 are revised as follows:

"§ 2.106 TABLE OF FREQUENCY ALLOCATIONS.

* * * * * * *

"Band (MHz)	Service	Class of station	Frequency (MHz)	Nature of stations	OF SERVICES
7	8	9	10	11	
*	*	*	*	*	*
"2150–2160 (NG 23) (NG 45)	Fixed	Fixed			Multipoint distribution. Operational fixed.
2160–2180 (NG 10) (NG 23)	do	do			Multipoint distribution. Domestic fixed public."

* * * * * * *

"NG 23 Frequencies in the band 2110–2200 MHz may also be assigned to stations in the international fixed public radio service located south of 25°30' north latitude in the State of Florida and in U.S. Possessions in the Caribbean area, provided, however, no new assignments in the band 2150–2162 MHz will be made to such stations after February 25, 1974.

* * * * * * *

"NG 45 In the 2150–2160 MHz band, operational fixed stations are limited to omni-directional operations only."

* * * * * * *

4. In § 21.1, a definition for Multipoint Distribution Service is added in appropriate alphabetical sequence to read as follows:

"§ 21.1 DEFINITIONS.

* * * * * * *

"*Multinational Distribution Service.*—A one-way domestic public radio service rendered on microwave frequencies from a fixed station transmitting (usually in an omnidirectional pattern) to multiple receiving facilities located at fixed points determined by the subscribers."

* * * * * * *

"5. In § 21.35, paragraph (a) is amended to read as follows:

"§ 21.35 LICENSE PERIOD.

"(a) Licenses for stations in the Domestic Public Land Mobile Radio, Rural Radio, Point-to-Point Microwave Radio, Local Television Transmission and Multipoint Distribution Services will be issued for a period not to exceed 5 years; in the case of common carrier Television STL and Television Pickup stations to which are assigned frequencies allocated to the broadcast services, the authorization to use such frequencies shall, in any event, terminate simultaneously with the expiration of the authorization for the broadcast station to which such service is rendered except that licenses for developmental stations will be issued for a period not to exceed one year. Unless otherwise specified by the Commission, the expiration of regular licenses shall be on the following date in the year of expiration:

"Domestic Public Land Mobile Radio Service (miscellaneous carriers), April 1.
Domestic Public Land Mobile Radio Service (telephone carriers), July 1.
Domestic Public Land Mobile Radio Service (all authorization pursuant to § 21.521—air/ground), September 1.
Rural Radio Service, November 1.
Point-to-Point Microwave Radio Service, February 1.
Local Television Transmission Service, February 1.
Multipoint Distribution Service, May 1."

"The expiration date of developmental licenses shall be one year from the date of grant thereof. When a license is granted subsequent to the last renewal date of the class of license involved, the license shall be issued only for the unexpired period of the current license term of such class; *Provided, however,* That the license for land and airborne mobile units issued in the Domestic Public Land Mobile Radio Service in the name of a person who is not the licensee of the base station with which the mobile unit will be associated shall be issued for a full five-year term from the date of grant thereof."

* * * * * * *

6. In § 21.107(b) footnote 2 is amended to add the following sentence at the end of the present text:

"§ 21.107 TRANSMITTER POWER.

* * * * * * *

"2 * * * Also, for exceptions in the Multipoint Distribution Service see § 21.904."

* * * * * * *

7. In § 21.108, the first sentence of paragraph (b) is amended to read as follows:

"§ 21.108 DIRECTIONAL ANTENNAS.

* * * * * * *

"(b) Stations operating below 2500 MHz (other than base mobile and auxiliary test stations in the Domestic Public Land Mobile Radio Service and stations in the Multipoint Distribution Service) which are required to use directional antennas shall employ antennas meeting the standards indicated below. * * *"

* * * * * * *

8. In § 21.501 paragraph (e) is amended to read as follows:

"§ 21.501 FREQUENCIES.

* * * * * * *

"(e) On a shared basis with fixed stations in the Point-to-Point Microwave Radio Service, frequencies in the bands 2110–2130 MHz and 2160–2180 MHz may be authorized for use by control and repeater stations functioning in conjunction with the Domestic Public Land Mobile Radio Service on the condition that the emission bandwidth is limited to the minimum necessary to serve the purpose required; *Provided, however,* no new assignments will be made in the band 2160–2162 MHz for stations located within 50 miles of the coordinates of the cities listed in § 21.901(c) of this chapter, except upon a showing that no alternative frequencies are available. Channel bandwidths in excess of 800 kHz will not be authorized. In each of these bands, the highest frequency which will not cause harmful interference to any other station shall be assigned."

* * * * * * *

9. In § 21.701(a), the band 2150–2160 MHz is deleted from the table; footnote 2 is referenced to the frequency bands 2110–2130 MHz and 2160–2180 MHz in the table; and footnotes 1 and 2 are revised to read as follows:

"§ 21.701 FREQUENCIES.

"(a) * * *

"[1] Frequencies in this band are shared with control and repeater stations in the Domestic Public Land Mobile Radio Service and with stations in the International Fixed Public Radio Communication Services located south of 25°30′ north latitude in the State of Florida and U.S. possessions in the Caribbean area. Additionally, the band 2160–2162 MHz is shared with stations in the Multipoint Distribution Service.

"[2] Except upon a showing that no alternative frequencies are available, no new assignments will be made in the band 2160–2162 MHz for stations located within fifty (50) miles of the coordinates of the cities listed in § 21.901(c) of this chapter."

* * * * * * *

10. § 21.703 [Amended].

In § 21.703(g), the Table of Frequency bands and Authorized bandwidths is revised to delete reference to the 2150–2160 MHz band and its 10.0 MHz authorized bandwidth.

11. New Subpart K (§§ 21.900–21.908) is added to read as follows:

"Subpart K—MULTIPOINT DISTRIBUTION SERVICE

"21.900 Eligibility.
21.901 Frequencies.
21.902 Frequency interference.
21.903 Purpose and permissible service.
21.904 Transmitter power.
21.905 Emissions and bandwidth.
21.906 Antennas.
21.907 Transmission standards.
21.908 Television transmitting equipment.

"§ 21.900 ELIGIBILITY.

"Authorizations for stations in this service will be granted to existing and proposed communications common carriers. Applications will be granted only in cases where it can be shown that: (a) the applicant is legally, financially, technically, and otherwise qualified to render the proposed service; (b) there are frequencies available to enable the applicant to render a satisfactory service; and (c) the public interest, convenience and necessity would be served by a grant thereof. In addition, the applicant shall submit a statement indicating whether there is any affiliation or relationship to any intended or likely subscriber or program originator. An applicant will not be eligible for authorization in this service unless it can be shown with reasonable certainty that at least fifty percent of the service rendered will be to subscribers who are not affiliated or related to the applicant.

"§ 21.901 FREQUENCIES.

"(a) Frequencies in the band 2150–2162 MHz are available for assignment to fixed stations in this service. Frequencies in the band 2150–2160 MHz are shared with non-broadcast omnidirectional radio systems licensed under other parts of the Commission's Rules, and frequencies in the band 2160–2162 MHz

are shared with directional radio systems authorized in other common carrier services.

"(b) Applicants may be assigned a channel according to one of the following frequency plans: (1) at 2150–2156 MHz (designated as channel 1), (2) at 2156–2162 MHz (designated as channel 2), or (3) at 2156–2160 MHz (designated as channel 2A).

"(c) Channels 2 and 2A will be assigned only where there is evidence that no harmful interference will occur either to Channel 1 operation in the same area, or (in the case of Channel 2) to any point-to-point facility in the 2160–2162 MHz band. Also, Channel 2 may be assigned only if the transmitting antenna of the station is to be located within ten (10) miles of the coordinates of the following metropolitan areas:

"Principal city:	*Coordinates*
"Akron, Ohio	Latitude 41°05′06″ N., longitude 81°31′06″ W.
Albany-Schenectady-Troy, N.Y	Latitude 42°39′00″ N., longitude 73°45′24″ W.
Anaheim-Santa Anna-Garden Grove, Calif	Latitude 33°46′30″ N., longitude 117°54′48″ W.
Atlanta, Ga	Latitude 33°45′00″ N., longitude 84°23′12″ W.
Baltimore, Md	Latitude 39°17′18″ N., longitude 76°37′00″ W.
Birmingham, Ala	Latitude 33°30′42″ N., longitude 86°48′24″ W.
Boston, Mass	Latitude 42°21′42″ N., longitude 71°03′30″ W.
Buffalo, N.Y	Latitude 42°53′12″ N., longitude 78°52′30″ W.
Chicago, Ill	Latitude 41°53′00″ N., longitude 87°37′30″ W.
Cincinnati, Ohio	Latitude 39°06′00″ N., longitude 84°30′48″ W.
Cleveland, Ohio	Latitude 41°29′48″ N., longitude 81°42′00″ W.
Columbus, Ohio	Latitude 39°57′42″ N., longitude 83°00′06″ W.
Dallas, Tex	Latitude 32°46′36″ N., longitude 96°48′42″ W.
Dayton, Ohio	Latitude 39°45′24″ N., longitude 84°11′42″ W.
Denver, Colo	Latitude 39°44′24″ N., longitude 104°59′18″ W.
Detroit, Mich	Latitude 42°20′00″ N., longitude 83°03′00″ W.
Fort Worth, Tex	Latitude 32°45′00″ N., longitude 97°17′42″ W.
Gary, Ind	Latitude 41°36′00″ N., longitude 87°20′00″ W.
Hartford, Conn	Latitude 41°46′00″ N., longitude 72°40′30″ W.
Houston, Tex	Latitude 29°45′48″ N., longitude 95°21′42″ W.
Indianapolis, Ind	Latitude 39°46′12″ N., longitude 86°09′18″ W.
Kansas City, Mo	Latitude 39°06′00″ N., longitude 94°34′42″ W.
Los Angeles-Long Beach, Calif	Latitude 34°03′18″ N., longitude 118°15′00″ W.
Louisville, Ky	Latitude 38°14′48″ N., longitude 85°45′42″ W.
Memphis, Tenn	Latitude 35°07′30″ N., longitude 90°03′24″ W.
Miami, Fla	Latitude 25°46′30″ N., longitude 80°11′24″ W.

Milwaukee, Wis	Latitude 43°02′18″ N., longitude 87°54′48″ W.
Minneapolis-St. Paul, Minn	Latitude 44°59′00″ N., longitude 93°15′48″ W.
New Orleans, La	Latitude 29°57′48″ N., longitude 90°03′48″ W.
New York City, New York-Newark-Jersey City-Patterson, N.J.	Latitude 40°42′30″ N., longitude 74°00′00″ W.
Norfolk, Va	Latitude 36°50′42″ N., longitude 76°17′12″ W.
Oklahoma City, Okla	Latitude 35°29′30″ N., longitude 97°30′12″ W.
Philadelphia, Pa	Latitude 39°57′00″ N., longitude 75°09′48″ W.
Phoenix, Ariz	Latitude 33°27′18″ N., longitude 112°04′24″ W.
Pittsburgh, Pa	Latitude 40°26′12″ N., longitude 80°00′30″ W.
Portland, Oreg	Latitude 45°32′06″ N., longitude 122°37′12″ W.
Providence, R.I	Latitude 41°49′00″ N., longitude 71°24′24″ W,
Rochester, N.Y	Latitude 43°09′30″ N., longitude 77°36′30″ W.
Sacramento, Calif	Latitude 38°35′06″ N., longitude 121°29′24″ W.
San Bernardino-Riverside, Calif	Latitude 34°06′30″ N., longitude 117°18′36″ W.
San Diego, Calif	Latitude 32°42′48″ N., longitude 117°09′12″ W.
San Francisco-Oakland, Calif	Latitude 37°46′30″ N., longitude 122°25′00″ W.
San Jose-Palo Alto-Sunnyvale, Calif	Latitude 37°22′36″ N., longitude 122°02′00″ W.
Seattle-Everett, Wash	Latitude 47°35′48″ N., longitude 122°19′48″ W.
St. Louis, Mo	Latitude 38°37′00″ N., longitude 90°11′36″ W.
Syracuse, N.Y	Latitude 43°03′06″ N., longitude 76°09′00″ W.
Tampa-St. Petersburg, Fla	Latitude 27°57′06″ N., longitude 82°27′00″ W.
Toledo, Ohio	Latitude 41°38′48″ N., longitude 83°32′30″ W.
Washington, D.C	Latitude 38°53′30″ N., longitude 77°02′00″ W."

"(d) An application for a second channel will not be accepted from a licensee or permittee of, or application for, another channel in this service (or any entity related thereto) in the same metropolitan area unless the applicant: (1) has operated the original channel for a minimum of one year; and (2) can demonstrate that there exists a public demand for additional service which is not likely to be satisfied by a competing carrier.

"§ 21.902 FREQUENCY INTERFERENCE.

"(a) All applicants, permittees, and licensees shall make exceptional efforts to avoid harmful interference to other users and to avoid blocking potential adjacent channel use in the same city and cochannel use in nearby cities. In areas where major cities are in close proximity, careful consideration should be given to minimum power requirements and to the location, height, and radiation pattern of the transmitting antenna. Licensees, permittees and applicants are expected to cooperate fully in attempting to resolve problems of potential interference before bringing the matter to the attention of the Commission.

"(b) As a condition for use of frequencies in this service, each carrier is

required to: (1) engineer the system to be reasonably compatible with adjacent channel operation in the same city; (2) not enter into any lease or contract or otherwise take any action which would unreasonably prohibit location of a competing carrier's transmitting antenna at any given site; and (3) cooperate fully and in good faith to resolve whatever potential interference and transmission security problems may be present in adjacent channel operation.

"(c) The following interference studies, as appropriate, shall be included with each application: (1) an analysis of the potential for harmful interference with other stations, if the coordinates of the proposed transmitting antenna are located within fifty (50) miles of the coordinates of any authorized, or previously proposed station(s) which utilizes, or would utilize, the same frequency (*see* §§ 21.701(a) & 21.901(a) of this chapter) or an adjacent potentially interfering frequency (*see* § 21.901(b); and (2) in the case of a proposal for use of Channel 2, an analysis of the potential for harmful interference with any authorized point-to-point stations located within fifty (50) miles which utilize the 2160–2162 MHz band; (3) an analysis concerning possible adverse impact upon Canadian communications if the station's transmitting antenna is to be located within thirty-five (35) miles of the Canadian border.

"§ 21.903 PURPOSE AND PERMISSIBLE SERVICE.

"(a) Multipoint Distribution Service stations are intended to provide one-way radio transmission (usually in an omnidirectional pattern) of subscriber supplied information from a stationary transmitter to multiple receiving facilites located at fixed points designated by the subscriber.

"(b) Unless otherwise directed or conditioned in the applicable instrument of authorization, Multipoint Distribution Service stations may render any kind of communications service consistent with the Commission's Rules and the legally applicable tariff of the carrier, provided that: (1) the carrier is not substantially involved in the production of, the writing of, or the influencing of the content of any information to be transmitted over the facilities; (2) the carrier does not render service to any entity who is affiliated with or related to the carrier whenever the total hours of service rendered to related subscribers exceeds the total hours of service rendered to unrelated subscribers within any calendar month; (3) the carrier controls the operation of all receiving facilities (including any equipment necessary to convert the signal to a standard television channel but excluding the television receiver); and (4) the carrier's tariff allows the subscriber the option of owning the receiving equipment (except for the decoder) so long as: (i) the customer provides the type of equipment as specified in the tariff; (ii) such equipment is in suitable condition for the rendition of satisfactory service; and (iii) such equipment is installed, maintained, and operated pursuant to the carrier's instructions and control.

"(c) The carrier's tariff shall fully describe the parameters of the service to be provided, including the degree of privacy of communications a subscriber can expect in ordinary service. If the ordinary service does not provide for complete security of transmission, the tariff shall make provision for service with such added protection upon request.

"§ 21.904 TRANSMITTER POWER.

"(a) The output power of the transmitter shall not exceed ten (10) watts, except as provided in paragraph (b) of this section.

"(b) As an exception to paragraph (a) of this section, additional transmitter output power may be authorized up to one hundred (100) watts if such higher power is justified by a special showing which contains: (1) a demonstration that the power requested is the minimum needed to provide adequate, reliable service to a reasonable service area with receiving sites utilizing parabolic antennas having a minimum diameter of two feet; (2) a thorough and positive demonstration that the requested power will not cause harmful interference with any authorized or previously proposed station operating on co-channel or adjacent channel frequencies; (3) a demonstration of the reasons why the applicant believes that an authorization of increased power is in, and will directly benefit, the public interest.

"(c) The transmitter output power specified in this section is the peak envelope power of the visual signal for television transmitters. For other than television transmitters, the transmitter output power is the peak envelope power of the entire emission.

"(d) For television transmission where the authorized bandwidth is 4.0 MHz or more for the visual and accompanying aural signal, the peak power of the accompanying aural signal shall not be more than twenty (20) percent nor less than ten (10) percent of the peak power of the visual signal.

"(e) Operating power shall not exceed the authorized power by more than ten (10) percent at any time.

"§ 21.905 EMISSIONS AND BANDWIDTH.

"(a) A station transmitting a television signal shall not exceed a bandwidth of 6 MHz (for both visual signal and accompanying aural signal), and will normally employ vestigial sideband, amplitude modulation (A5C) for the visual signal, and frequency modulation (F3) for the accompanying aural signal.

"(b) For purposes other than standard television transmission different types of emissions may be authorized if the applicant describes fully the modulation and bandwidth desired, and demonstrates that the bandwidth desired is no wider than needed to provide the intended service. However, in no event shall the necessary or occupied bandwidth, whichever is greater, exceed 6 MHz.

"§ 21.906 ANTENNAS.

"(a) Transmitting antennas shall be omnidirectional, except that a directive antenna with a main beam sufficiently broad to provide adequate service may be used either to avoid possible interference with other users in the frequency band, or to provide coverage more consistent with distribution of potential receiving points.

"(b) The use of horizontal or vertical plane wave polarization, or right hand or left hand rotating elliptical polarization may be used to minimize the hazard of harmful interference between systems.

"(c) Transmitting antennas located within thirty-five (35) miles of the Canadian border should be directed so as to minimize, to the extent that is practical, emissions towards the border.

"(d) Directive receiving antennas shall be used at all points and shall be elevated no higher than necessary to assure adequate service. Receiving antenna height shall not exceed the height criteria of Part 17 of this chapter, unless authorization for use of a specific maximum antenna height (above ground and above mean sea level) for each location has been obtained from the Commission prior to the erection of the antenna. Requests for such authorization shall show the inclusive dates of the proposed operation. (*See* Part 17 of this chapter concerning the construction, marking and lighting of antenna structures.)

"§ 21.907 TRANSMISSION STANDARDS.

"(a) A carrier assigned a 6 MHz channel must be able to provide one type of monochrome and color television service which complies with the VHF transmission standards set forth in § 73.682(a) of this chapter, except that the provision of § 21.906(b) shall replace the requirements of § 73.682(a)(14) of this chapter.

"(b) A carrier assigned a 4 MHz channel must be able to provide one type of monochrome and/or color television service which complies with VHF transmission standards set forth in § 73.682(a) of this chapter, except that: (1) the provision of § 21.906(b) shall replace the requirements of § 73.682(a)(14) of this chapter, and (2) the requirements of § 73.682(a)(1), (a)(2), (a)(3), (a)(4), (a)(5), (a)(9), (a)(19), and (a)(20) of this chapter shall not apply.

"(c) In addition to the standard television transmission service specified in paragraphs (a) and (b), the carrier may offer a television service not meeting such standards if the tariff clearly describes the type and quality of the service and distinguishes it from the standard service, and if the transmitter is type accepted for such use.

"(d) For services other than television, a carrier may provide transmissions as described in the tariff if the authorized bandwidth is not exceeded and the transmitter is type accepted for such use.

"(e) In order to insure that transmitting information is not likely to be received in intelligible form by unauthorized subscribers or licensees, a carrier may vary the transmission standards specified in paragraphs (a), (b), and (c) of this section, provided that the encoded information is recoverable without perceptible degradation as compared to the same information transmitted in accordance with paragraphs (a), (b) and (c) of this section.

"§ 21.908 TELEVISION TRANSMITTING EQUIPMENT.

"(a) Except as otherwise provided in this section, the requirements of paragraphs (a), (b), (c), (d), and (e) of § 73.687 of this chapter shall apply to stations in this service transmitting standard television signals.

"(b) The average power of radio frequency harmonics of the visual and aural carriers, measured at the output terminals of the transmitter, shall be attenuated no less than sixty (60) decibels below the peak visual output power within the assigned channel. All other emissions appearing on frequencies more than fifty (50) percent of the authorized bandwidth above or below the upper and lower edges, respectively, of the assigned channel shall be attenuated no less than: (i) thirty (30) decibels for transmitters rated at less than ten (10) watts visual peak power output; or (ii) forty (40) decibels for transmitters rated at ten (10) watts or more visual peak power output. However, should interference occur as the result of emissions outside the assigned channel, greater attention may be required.

"(c) The provisions of § 21.101 shall apply with respect to the frequency tolerance for the visual carrier in lieu of § 73.687(c)(1) except for the frequency of the aural carrier which shall be maintained in accordance with § 73.687(c)(1) of this chapter.

"(d) The requirements of § 73.687(c)(2) will be considered to be satisfied insofar as measurements of operating power are concerned if the transmitter is equipped with instruments for determining the combined visual and aural operating power. However, licensees are expected to maintain the operating powers within the limits specified in § 21.904. Measurements of the separate visual and aural operating powers should be made at sufficiently frequent intervals to insure compliance with the rules and in no event less than once a month.

"(e) Television transmitting equipment designed for stations whose authorized bandwidth is 4 MHz or less for the visual and accompanying aural signal is subject to the provisions of § 21.101 with respect to the frequency tolerance of the visual and aural carriers in lieu of paragraph (c) above. Such equipment is also subject to paragraphs (a) and (b) of this section, except that the provisions of § 73.687(a), (b), and (c)(1) of this chapter shall not apply.

"(f) As a further exception to the other requirements of this section, transmitting equipment characteristics may vary from these requirements to the extent necessary to insure that transmitted information is not likely to be received in intelligible form by unauthorized subscribers or licensees, provided such variations permit recovery of the transmitted information without perceptible degradation as compared to the same information transmitted without such variations."

12. New § 43.72 is added to read as follows:

"§ 43.72 REPORTS OF OPERATORS IN THE MULTIPOINT DISTRIBUTION SERVICE.

"(a) No later than March 1 of each year for the preceding calendar year, every common carrier in the Multipoint Distribution Service shall file with the Commission two copies of a report which shall include the following:

"(1) Name and address of carrier;

"(2) Station(s) call letters and primary geographic service area(s);

"(3) Condensed balance sheet as of the end of the calendar year, including as separate items thereon the investment in and book depreciation reserve related to the Multipoint Distribution Service plant and equipment;

"(4) Condensed income statement for the calendar year showing as separate items revenues and expenses related to Multipoint Distribution Service;

"(5) The following statistical information (preferably in tabular form) for the station (and each channel thereof) the carrier operates: (i) the total number of separate subscribers served during the calendar year; (ii) the total hours of transmission service rendered during calendar year to all subscribers; (iii) the total hours of transmission service rendered during the calendar year in the following use categories: entertainment, public safety, education, business training, business communication, business promotion, data transmission, and any other identified use which constituted five (5) percent or more of the total annual service offered;

"(6) And, if any subscriber is affiliated with or related to the carrier in any way, the name of such subscriber, the nature of the subscriber's relationship with the carrier, and the annual hours of service provided to each subscriber.

"(b) This report shall be certified as to the accuracy of the information contained therein by an appropriate corporate officer, controlling partner, or individual proprietor.

"(c) A copy of each year's report shall be retained in the principal office of the carrier in the city served and shall be readily available for reference and inspection."

F.C.C. 74-187

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF NEW BERN BROADCASTING CO., INC., RADIO STATION WHIT, NEW BERN, N.C.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated April 18, 1973 (mailed April 19, 1973) issued to New Bern Broadcasting Company, Inc., licensee of Radio Station WHIT, New Bern, North Carolina and (2) the licensee's reply dated May 14, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture in the amount of $750 which was issued in this proceeding indicated that in violation of Section 73.47(b) of the Commission's Rules the licensee failed to provide equipment performance measurements as required by Section 73.47(a) of the Rules.[1] It appeared at the time of inspection on July 8, 1972, that current equipment performance measurements were not available. Subsequently licensee submitted measurements dated June 7, 1969 and July 6, 1972 and stated that no equipment performance measurements were made in 1970 or 1971. Further, the Notice indicated that the licensee had not kept maintenance logs during the period June 1, 1971 to May 25, 1972.

3. In reply to the Notice of Apparent Liability licensee admits the violations as cited and states that no excuse can be found for the violations. However, the licensee requests a "waiver of the fine" citing industry-wide personnel problems, its good radio service to the area, and lack of a fair economic return on the licensee's investment. Further, licensee states that the violations were not done willfully or flagrantly.

4. We find that the licensee repeatedly violated Section 73.47(b) during the period April 19, 1972, to July 6, 1972, when equipment performance measurements were made. Further, we find that the licensee repeatedly violated Section 73.111(a) of the Commission's

[1] At the time of the violations, Section 73.47 provided in pertinent part as follows: "Section 73.47(a). The licensee of each standard broadcast station shall make equipment performance measurements of authorized main and alternate main transmitters at least once each calendar year: Provided, however, that the dates of completion of successive sets of measurements shall be no more than fourteen months apart. . . (b) The data required by paragraph (a) of this section, together with a description of instruments and procedure, signed by the engineer making the measurements, shall be kept on file at the transmitter and retained for a period of two years, and on request shall be made available during that time to any duly authorized representative of the Federal Communications Commission."

Rules by failing to keep a maintenance log for WHIT during the period April 19, 1972 to May 25, 1972. Having found the violations to be repeated, it is unnecessary that we make any additional finding as to willfulness. *Paul A. Stewart*, FCC 63–411, 25 RR 375. Considering all the circumstances in this case, including the licensee's financial condition, and the efforts to serve the community, we are not persuaded to remit the forfeiture. Licensees are expected to comply with the technical rules as well as to make continued efforts to serve the community to which they are licensed. *Henryetta Radio Co.*, 21 FCC 2d 825 (1970).

5. Accordingly, IT IS ORDERED, That New Bern Broadcasting Company, Inc., the licensee of Radio Station WHIT, New Bern, North Carolina, FORFEIT to the United States the sum of seven hundred and fifty dollars ($750) for repeated violations of Sections 73.47(b) and 73.111(a) of the Commission's Rules. Payment of this forfeiture may be made by mailing a check, or other similar instrument, to the Commission payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules, an application for remission or mitigation of forfeiture may be filed within thirty days of the date of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary*.

F.C.C. 73-931

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint by
STEPHEN M. SLAVIN, CHICAGO, ILL.
Concerning Political Broadcast Re Station WLS-TV, Chicago, Ill.

SEPTEMBER 6, 1973.

Mr. STEPHEN M. SLAVIN,
105 West Adams Street,
Suite 2100,
Chicago, Ill.

DEAR MR. SLAVIN: This is in reply to your complaint against Station WLS-TV in Chicago, Illinois. The station is licensed to the American Broadcasting Company.

You state that during the 1972 fall election campaign you were a candidate for the Illinois State Senate. You allege that WLS-TV broadcast an editorial endorsing the candidacy of your opponent, State Senator Karl Berning, and that the station failed to comply with the requirements of Section 73.679(c) of the Commission's rules.

The election was held on November 7. The editorial in question was broadcast a total of six times during the period from October 24 to October 30. The text of the editorial is as follows:

> Charges of corruption in government at all levels have been flying everywhere here in Illinois.
>
> The state legislature will be given a chance at its next session to do something about it if Senator Karl Berning of Dearfield has his way.
>
> Senator Berning says he will introduce legislation to create a Public Integrity Commission which would be an independent watchdog agency.
>
> Commission members would be chosen by various citizens groups and would be able to call for special grand jury investigations of corruption in government. No public or political officials would be permitted on the board which would have the power to issue subpoenas and appoint special prosecutors.
>
> Channel 7 believes this type of legislation could be extremely important in controlling government corruption.
>
> Similar suggestions in the past have been brushed aside in Springfield or allowed to die in some obscure committee.
>
> Let's hope this time around our legislators are willing to let the public see what is going on behind those closed doors.

It appears that Mr. Berning's campaign workers distributed a campaign flier consisting of the printed editorial along with the ABC logo. In reply to a request by you for air time to respond to the editorial, WLS-TV broadcast a disclaimer on November 6 at 8:30 a.m. and 11:40 p.m. and on November 7 (Election Day) at approximately 12:15 a.m.—consisting of a photograph of the campaign flier with a background voice stating that the use of the ABC logo was unauthor-

ized and that the station had a policy of not endorsing individual candidates. WLS–TV also wrote to Mr. Berning objecting to the unauthorized use of ABC trademarks and demanding that such use cease immediately.

You state that a "principal issue" of your campaign was "the need for strengthened ethics legislation for state officials"; that on October 22 Mr. Berning called a press conference and released his proposal for the creation of a "Governmental Integrity Commission"; that WLS–TV broadcast an editorial endorsing this proposal that was interpreted by some in the community as an endorsement of Mr. Berning's candidacy; that the disclaimer was an inadequate substitute for a response; and that WLS–TV violated Section 73.679(c) of the Commission's regulations in that it failed to notify you of the broadcast of the editorial; failed to supply you with a copy or a tape of the editorial; and failed to give you a reasonable and adequate time to respond to the editorial.

In response to a Commission inquiry, in a letter of March 5, ABC states that the editorial in no way constituted an endorsement of Mr. Berning nor did it even inferentially advocate his election; that the mere mention of Mr. Berning in a context expressing support for a proposal advanced by him to reduce corruption in government "cannot and should not be construed as an endorsement of the candidate" and that accordingly it does not believe that the editorial is comprehended by Section 73.679(c) of the Commission's rules. ABC further states that the station was not aware that "Honesty in government" or how to foster it was the predominant issue in the campaign; that it regarded the issue of corruption as one of general applicability; and that it was the kind of issue where all candidates could be expected to espouse support for honesty and condemn corruption. ABC asserts that your representative requested "equal time" to discuss your campaign platform and opposition to Mr. Berning's re-election; that since WLS–TV had no obligation to make time available to you or your representative for the purpose of discussing or advancing your campaign, the request for "equal time" was denied on November 2; that on November 3 WLS–TV decided to offer a brief period of time on November 6 for your representative to explain his position on the ethics issue; that you rejected the station's offer of time, stating that you could not arrange for a representative to be present at the WLS–TV studio by the November 6 date; and that you as an alternative suggested that the station broadcast a disclaimer, informing the public that the Berning flier was unauthorized and that WLS–TV was not endorsing either candidate.

In a response to ABC's reply, dated March 12, 1973, you stated that the editorial implied a request that Mr. Berning be returned to the legislature for its next session in order that he might "have his way"; that the Berning campaign flier also reflected such an interpretation; that you sought time on WLS–TV only to present your ethics platform and to rebut the endorsement of the Berning ethics proposal; that the initial offer of time by the station was limited to a one-minute live appearance on Monday, November 6 at 8:30 a.m.; that the station rejected your request for a personal response and stated that only a

representative acting on your behalf could respond in a live appearance since there would be no time to tape the response in advance; that this offer was rejected for several reasons, including the unsuitability of the time offered and the lack of a campaign staff representative to make such an appearance; that the implication that you at any time were satisfied with WLS–TV's offer to broadcast the disclaimer is false; that you accepted only what WLS–TV offered to make available; that the WLS–TV editorial was broadcast a total of six times, including several airings during what must be considered prime time; that the disclaimers were aired only a total of three times; and that the facts do support your conclusion that the licensee violated Section 73.679(c) of the Commission's rules.

In a reply to your response, in a letter dated April 6, 1973, ABC restated that WLS–TV at all times sought to be fair in handling this controversy and that it had no intention of favoring either of the candidates in the election contest. Included with the response were the affidavits of the General Manager and Editorial Director, affirming the station's response to your complaint.

Section 73.679(c)[1] of the Commission's rules requires that a licensee which broadcasts an editorial which endorses a legally qualified candidate shall, within 24 hours after the editorial, transmit to the candidate opposed: (a) notification of the date and the time of the editorial, (b) a script or tape of the editorial, and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities.

The primary question presented is whether the WLS–TV editorial constituted an "endorsement" of a legally qualified candidate within the meaning of Rule 73.679. It is obvious, of course, that the favorable reference to legislation Senator Berning proposed to introduce in the next legislative session might have had the effect of enhancing his chances for re-election. But it is clear from a full reading of the editorial that it was the need for legislation to control government corruption that the station sought to endorse, and not the candidacy of Senator Berning per se. Furthermore, the surrounding circumstances do not indicate that WLS–TV intended to make an editorial endorsement in this particular election contest. The station has a general policy against endorsing any candidates and broadcast denials that an endorsement was intended here.

We realize that the favorable reference to the legislative proposal advanced by Senator Berning and the identification of him by name in the editorial could arguably and with some logic be viewed as an en-

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[1] Section 73.679(c) of the rules states:

"§ 73.679 PERSONAL ATTACKS; POLITICAL EDITORIALS.

* * * * * * *

"(c) Where a licensee, in an editorial, (1) endorses or (2) opposes a legally qualified candidate or candidates, the licensee shall, within 24 hours after the editorial, transmit to respectively (i) the other qualified candidate or candidates for the same office or (ii) the candidate opposed in the editorial (a) notification of the date and the time of the editorial; (b) a script or tape of the editorial; and (c) an offer of a reasonable opportunity for a candidate or a spokesman of the candidate to respond over the licensee's facilities: Provided, however, That where such editorials are broadcast within 72 hours prior to the day of the election, the licensee shall comply with the provisions of this paragraph sufficiently far in advance of the broadcast to enable the candidate or candidates to have a reasonable opportunity to prepare a response and to present it in a timely fashion.

dorsement of Senator Berning's candidacy. And logically the same would be true where a station endorses a proposal closely identified with a candidate but makes no reference to the candidate by name. But to apply our political editorializing rules in these situations—where no clear-cut endorsement of a candidacy is involved—would make little practical or legal sense. For instead of encouraging "uninhibited, robust, and wide-open" debate, *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964), the effect of our ruling would be to inhibit it. Licensees would, we fear, view election periods as the occasion for editorial caution and blandness, rather than an opportunity for the vigorous promotion of an informed electorate. To interpret our political editorializing rules in such an all-encompassing fashion might well ease our administrative burden, but it would not promote the goals of the Fairness Doctrine nor for that matter the ends and purposes of the First Amendment. *Cf.*, *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 390 (1969). We must strike a balance in administering these rules, realizing that in doing so we must give considerable deference to the good faith judgments of our licensees. We have done so here and have concluded that WLS–TV has not violated our rules governing political editorials.

Commissioners Burch, Chairman; Johnson and H. Rex Lee dissenting.

BY DIRECTION OF THE COMMISSION,
VINCENT J. MULLINS, *Acting Secretary.*

F.C.C. 74R–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SALEM BROADCASTING COMPANY, INC., SALEM, N.H.	Docket No. 19434 File No. BP–18325
NEW HAMPSHIRE BROADCASTING CORP., SALEM, N.H.	Docket No. 19435 File No. BP–18479
SPACETOWN BROADCASTING CORP., WEST DERRY, N.H.	Docket No. 19436 File No. BP–18492
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted March 1, 1974; Released March 6, 1974)

BY THE REVIEW BOARD: BOARD MEMBER PINCOCK ABSENT.

1. The mutually exclusive applications of Salem Broadcasting Company, Inc. (Salem), New Hampshire Broadcasting Company (New Hampshire) and Spacetown Broadcasting Corporation (Spacetown) for a new standard broadcast station were designated for hearing by Commission Memorandum Opinion and Order, 33 FCC 2d 672 (1972). Now before the Review Board is a joint petition to enlarge issues, filed December 21, 1973, by Salem and New Hampshire, alleging that Spacetown has attempted to obstruct and undermine the prosecution of their applications.[1]

2. The factual basis for the joint petition is not disputed by the parties. Both Salem and New Hampshire propose tower locations in a rural area of Salem, New Hampshire, which is not presently zoned for such use. While Salem has not yet requested the necessary zoning variance, requests by New Hampshire have already been denied by the Salem Board of Adjustment. On November 23, 1973, more than a week before the Board's final hearing on New Hampshire's request for a zoning variance, Peter V. Gureckis, a shareholder of and consulting engineer for Spacetown, sent a letter concerning New Hampshire to George A. Stella, attorney for the Greenwood Civic Organization, a group opposing New Hampshire in the zoning proceeding.[2] In this letter, Gureckis stated that a directional array meeting all Commission rules could be built on a site in Salem zoned for commercial-industrial use without the need for a zoning variance. At the commercial site, a six-tower array would be required for the 5 KW operation planned by Salem and New Hampshire, Gureckis maintained in his letter, but a

[1] Also before the Board are the following related pleadings: opposition, filed January 14, 1974, by the Broadcast Bureau; opposition, filed January 14, 1974, by Spacetown; reply, filed January 29, 1974, by Salem and New Hampshire.

[2] In an affidavit accompanying the petition, Lewis F. Soule, president of Salem, states that a copy of the Gureckis letter was delivered to him on November 27, 1973.

reduction in power from 5 KW to 1 KW, coupled with a waiver of the Commission's city grade service requirements, would permit the use of a four-tower array as proposed by the two applicants. Gureckis further claimed in his letter that land zoned for commercial-industrial use was available in the town of Salem but that the two applicants had failed to consider it because industrial land is more expensive than land zoned for rural use.

3. According to petitioners, this letter from Gureckis to Stella was designed to assist Stella in opposing the New Hampshire application and to stir up opposition to Salem's proposed use of its site and thus it constitutes an improper attempt by Spacetown to prevent petitioners from prosecuting their applications.[3] Moreover, petitioners assert, Spacetown has aggravated its improper conduct by premising its letter on erroneous and unsupported factual representations. Gureckis' allegation that a directional array utilizing a power of 5 KW can be located on commercial-industrial land is unsupported by an adequate engineering study,[4] Salem and New Hampshire argue, and his contention that a four-tower array operating at a reduced power of 1 KW can be utilized has been specifically repudiated by the Commission. In this regard, petitioners cite the Review Board's Memorandum Opinion and Order in *Salem Broadcasting Co.*, 38 FCC 2d 170, 25 RR 2d 955 (1972), rejecting Spacetown's argument that the two Salem applicants were proposing excessive power (5 KW), on the grounds that the Commission's designation Order had concluded that a 1 KW operation would not provide adequate service to the town of Salem. Finally, petitioners dispute Gureckis' claim that a zoning variance would not be necessary if the towers were located on commercial-industrial property. Because the Salem Zoning Ordinance does not specifically permit the construction of radio towers on land zoned for commercial-industrial use and because the towers would exceed the height restrictions applicable to such land, a zoning variance would be required to build radio towers on Gureckis' proposed site, petitioners conclude.

4. The Broadcast Bureau opposes the joint petition on several grounds. There is no evidence that the letter in question was mailed to Stella or received by him, the Bureau argues, and even if such evidence is available, it asserts, the letter does not have to be interpreted in the manner suggested by petitioners. In addition, the Bureau believes that petitioners' reliance on *WIOO, Inc., supra*, is misplaced, since that case dealt with lengthy investigations of competing applicants, while petitioners here have cited only one isolated action which the Bureau considers insufficient to support their changes.

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[3] Petitioners cite *WIOO, Inc.* —— FCC 2d ——, 28 RR 2d 685 (1973) in support of their position.

[4] In an affidavit accompanying the petition, Ronald H. Culver, the consulting engineer for New Hampshire, states that he has reviewed Gureckis' letter and has concluded that it contains unsupported opinions and omits such pertinent factual information as design data for the towers and an FAA determination of whether the proposal would constitute a hazard to air navigation.

5. Spacetown, in opposition, denies that the Gureckis letter was an improper attempt to obstruct petitioners' applications.[5] Rather than stirring up zoning problems for Salem and New Hampshire, the letter was intended to correct misrepresentations made by petitioners to the Salem Board of Adjustment, Spacetown asserts.[6] According to Spacetown, petitioners have represented to the Board of Adjustment that the tower sites proposed in their applications are the only suitable ones in the town and that failure to approve these sites will leave the town without a radio station. The Gureckis letter was designed to correct this impression by demonstrating that a radio tower could be located in a commercial area, Spacetown maintains. As further evidence of the propriety of the letter, Spacetown cites the fact that Gureckis did not try to approach Stella in secret, but instead sent copies of his letter to Salem and New Hampshire. Further, Spacetown asserts, its participation in the zoning proceeding was not improper since public participation in such hearings is specifically invited through prior publication of the agenda for Board of Adjustment meetings. Spacetown also disputes petitioners' contention that the Gureckis letter contains material errors and misrepresentations. The assumption that no variance would be required for a radio tower in a commercial-industrial area was erroneous, it admits, but the error was not a significant one, since the major issue before the Board of Adjustment was whether the towers had to be located in a residential area and not whether they could be built elsewhere without a variance. Moreover, Spacetown continues, the Commission has never considered whether a 1 KW operation from its suggested commercial site would be possible. Finally, Spacetown submits an engineering exhibit prepared by Peter Gureckis which includes designs for 1 KW and 5 KW operations at its proposed site. The engineering exhibit also contains a letter to Peter Gureckis from Frank G. Lappas, an aeronautical consultant, who expresses the opinion that the towers proposed by Gureckis would not constitute an unacceptable hazard to air navigation.

6. Petitioners, in reply, argue that they have never made any representations concerning their proposals in terms of residential or commercial property, but have instead consistently maintained that a site in the southeast corner of Salem would be necessary in order to meet all Commission standards. Petitioners also dispute Spacetown's claim that its letter was a response to legal notices of the zoning hearing, arguing that Spacetown which is seeking a construction permit in West Derry, New Hampshire, has no rights which will be affected by the actions of the Salem Board of Adjustment and therefore has no standing as a party before the Board. Turning to Gureckis' engineering proposals, petitioners reject the contention that 1 KW and 5 KW operations can be located on a commercial site. A 1 KW operation at a location close to the commercial site was rejected by the Commission

[5] In an affidavit accompanying the opposition, Peter V. Gureckis states that he is the author of the letter in question. Though he does not specifically state that he mailed the letter as well, it can be assumed that he did so under the circumstances.

[6] Spacetown also disputes petitioners' contention that it has "stirred up" their zoning problems. The controversy over the zoning variance requests is a long-standing one, it claims. In support of its argument, Spacetown offers several newspaper accounts of the applicants' dealings with the Board of Adjustment. The first account is dated April 12, 1972 and the last, October 11, 1973.

in *Salem Broadasting Co., supra*, they assert, and the two sites are so close together that there can be no significant difference between them in terms of adequacy of coverage. The 5 KW proposal is also unacceptable petitioners claim, since it would have to be operated at a reduced power of 4 KW and would require a site of approximately 28 acres, almost twice the area required for their proposed 5 KW facilities. In addition, petitioners conclude, Spacetown has made no showing that a site of the appropriate size and shape is available in an area zoned for commercial-industrial use.

7. *WIOO, Inc., supra*, and the cases cited therein[7] prohibit attempts by an applicant to subvert or obstruct the prosecution of another application. In our view, however, Spacetown's conduct does not constitute such an attempt. The history of New Hampshire's dealings with the Salem Board of Adjustment, as revealed in the newspaper articles and excerpts from Board minutes submitted with the pleadings, convinces us that the zoning opposition encountered by New Hampshire was not "stirred up" by Spacetown, as petitioners claim. Rather, the opposition appears to have developed well before the date of the Gureckis letter and to be led by local groups, not by a competing applicant. Further, the primary argument presented in the Gureckis letter, that petitioners' radio towers can be located on property zoned for commercial-industrial use, is not so patently erroneous or unsupported that bad faith on Spacetown's part can be inferred.[8] Taking these considerations into account, it might be possible to argue that Spacetown's letter was an unsolicited intrusion into matters which did not immediately concern the applicant, and which was not directly related to the objectives of this hearing. But even if this argument is accepted, the charge of obstructing the prosecution of a competing application is an extremely serious one, and under the circumstances presented here, we cannot conclude that Spacetown's conduct was so improper and unethical that addition of the requested issue is justified.

8. Accordingly, IT IS ORDERED, That the joint petition to enlarge issues, filed December 21, 1973, by Salem Broadcasting Company, Inc. and New Hampshire Broadcasting Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[7] *Chronicle Broadcasting Co.*, 19 FCC 2d 240, 16 RR 2d 1014 (1969) and *National Broadcasting Co., Inc.*, 21 FCC 2d 195, 18 RR 2d 74 (1970).

[8] We do not consider the accuracy of Gureckis' claims to be at issue here, except to the extent that it reflects on Spacetown's intentions. Improper conduct can be grounded on accurate as well as inaccurate information.

F.C.C. 74–182

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SAN JUAN NON-PROFIT TV ASSOCIATION (K73BB), FARMINGTON-BLOOMFIELD HIGHWAY AND HUERFANO-BLOOMFIELD HIGHWAY AREA, NEW MEXICO For Renewal of License	File No. BRTT–430

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has before it for consideration the above-captioned application of San Juan Non-Profit TV Association, seeking renewal of the license of television broadcast translator station K73BB, Farmington-Bloomfield Highway and Huerfano-Bloomfield Highway area, New Mexico, which rebroadcasts the programs of station KOB–TV, channel 4, Albuquerque, New Mexico (NBC). On May 31, 1973, a "Petition to Condition License Renewals" was filed by Four States Television, Inc., licensee of station KIVA–TV, channel 12, Farmington, New Mexico (NBC).[1]

2. The three translators against which the petition was directed all rebroadcast the programs of station KOB–TV. Since stations KIVA–TV and KOB–TV are both NBC affiliates, petitioner sought same-day nonduplication protection for station KIVA–TV from the three translators.[2] On October 18, 1973, the applicant, through counsel for KOB–TV, advised the Commission that stations K70CT and KØ7IY would voluntarily commence same-day nonduplication protection for station KIVA–TV, but that such program exclusivity would not be provided by stations K73BB.[3] The basis for this refusal is that station K73BB is not licensed to Farmington and the transmitter site on Huerfano Peak is about 35 miles from Farmington. For this reason, the applicant states, few locations in Farmington are able to receive the signals of station K73BB and even at those locations, the signals are extremely weak and generally not usable. There can be no adverse effect on KIVA–TV, the applicant reasons. In addition, the applicant says,

[1] The petition is directed against the applications of San Juan Non-Profit TV Association for renewal of the licenses of three of its translators: K70CT, Farmington, New Mexico (BRTT–29); KØ7IY, Bloomfield and Blanco, New Mexico (BRTTV–2190) and K73BB. For the reasons stated *infra*, the only application still in contest is the one for renewal of the license of station K73BB.

[2] The translators serve areas within the predicted Grade A or higher contour of station KIVA–TV.

[3] The operation of station KØ7IY has been terminated for reasons unrelated to this matter.

nonduplication protection costs approximately $150 per month and its availability is, in any event, uncertain.[4] As a nonprofit community organization, the applicant states that it simply cannot afford such costs.

3. It is well established Commission policy that, in its own city of license, a television station is entitled to program exclusivity as against all translator stations; e.g. *Mt. Mansfield Television, Inc.*, 41 FCC 2d 899, 27 RR 2d 1585. Station K73BB is not licensed to Farmington and it is not designed nor intended to serve Farmington. The parties seem to agree, nevertheless, that there are parts of the community where the translator's signals can be received, although the quality of reception is a matter of differing opinion. Petitioner has not shown that the translator serves a significant portion of Farmington with a usable signal.[5] This is the heart of the matter. Furthermore, petitioner has not shown that the continued operation of a UHF translator, as presently authorized, serving a sparsely populated rural area from a site 35 miles from Farmington, would have any significant adverse impact on the successful operation of station KIVA–TV and it certainly has not shown that the public interest would be adversely affected. On the other hand, the translator licensee is dependent upon the public largesse for its financial support and, assuming that a private telephone line could be obtained at any cost, the financial burden of providing the protection could well result in its demise. Of the three translators against which the petitioner sought program exclusivity, one is providing the protection and one has discontinued operation, the latter not attributable to the efforts of the petitioner. Under these circumstances, we can foresee a reluctance by the public in the Farmington-Bloomfield Highway and Huerfano-Bloomfield Highway areas to provide financial support to a translator which, in order to provide exclusivity for parts of Farmington, blacks out NBC programs to the area it is licensed to serve, particularly where it is the last of three translators carrying those programs.

4. For the reasons stated, we believe that imposition of a nonduplication condition, which is neither required nor warranted by any of our rules or policies, could only result in injury to the public interest. Consequently, we find that the applicant is qualified to own and operate station K73BB, that imposition of a nonduplication condition is not warranted, and that unconditional grant of the application would serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That the petition filed herein by Four States Television, Inc., IS DENIED, and the above-captioned application of San Juan Non-Profit TV Association, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[4] The applicant states that a private telephone line is necessary and the telephone company will not make a commitment to install the line, but, if installed, the costs would be $150 per month.

[5] The only specific allegation in this respect is petitioner's assertion that the translator's signals can be received "quite well" at KIVA–TV's studios and at the home of petitioner's president.

F.C.C. 74-117

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REGIS T. SKEEHAN, JR., FALLS CHURCH, VA., COMPLAINANT
v.
THE CHESAPEAKE & POTOMAC TELEPHONE CO. OF VIRGINIA, RICHMOND, VA., DEFENDANT

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released March 1, 1974)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; REID AND WILEY CONCURRING IN THE RESULT.

1. We have before us for consideration a formal complaint filed under Section 208 of the Communications Act of July 19, 1971 by Regis T. Skeehan, Jr. (hereinafter "complainant") of Falls Church, Virginia against the Chesapeake and Potomac Telephone Company of Virginia (hereinafter "C&P") and also complainant's supplemental complaint filed on September 24, 1973. Complainant's prior informal complaint, filed on March 30, 1971 and served on C&P on April 16, 1971, was not resolved to his satisfaction. He contends in his formal complaint and other correspondence that he was overcharged by $0.45 (or 10%) for an interstate toll telephone call to Pittsburgh, Pennsylvania on November 17, 1970. He also alleges that he personally timed the call in question with his wristwatch and that the duration of the call was 30 minutes. C&P billed complainant for 33 minutes. He alleges that either C&P's timing and billing equipment are inaccurate or that an error was made when C&P transcribed the charge to his telephone bill. As damages, complainant requests $11.75, that sum representing 10% of his interstate toll charges from August 1, 1970 to August 1, 1971, plus tax and accrued interest. Complainant's supplemental complaint amended his request for damages to include an additional $20.05, this sum representing 10% of his interstate toll charges from August 1, 1971 to December 13, 1972, plus tax and accrued interest. In requesting such damages complainant contends that he was overcharged by 10% on all toll calls he made during the aforementioned periods. He also requests that we order an investigation into the accuracy of the equipment utilized by C&P in timing toll telephone calls. In its responsive pleading and other correspondence C&P denies that it overcharged complainant by 10% for the November 17, 1970 toll call or for any other toll call placed by complainant from August 1, 1970 to December 13, 1972 and alleges that its automatic timing equipment and the equipment and methods utilized in preparing customer

bills are extremely accurate and reliable and are constantly checked (through various measures such as parity checks, random sample techniques, etc.) to assure accuracy and reliability. C&P requests that we dismiss the complaints.

2. We conclude that complainant is entitled to a refund from C&P of $0.45 plus any taxes thereon. We are ordering such refund because of C&P's improper destruction of written records containing specific information regarding the November 17, 1970 toll call, which records, if retained, could possibly support C&P's general claim that it properly billed complainant. In view of the uncertainty regarding the destruction date of pertinent timing and billing tapes we are unable to determine whether their destruction in this case was improper. In its letter of November 17, 1972 C&P admitted that it destroyed pertinent written records notwithstanding that C&P was served the informal complaint on April 16, 1971, at which time it clearly had in its possession written records going back six months, or to on or about September 16, 1970. As we stressed in our recent January 3, 1974 decision on the formal complaint of *Richard N. Maller* v. *New England Telephone Company*, FCC 73–1361, it is the duty of the carriers under our jurisdiction, upon being served by us with an informal or formal complaint, to examine promptly and preserve all records then in its possession that are relevant and material to a resolution of the questions raised by the complaint until such time as the complaint is finally resolved. Thus, C&P was unable to show in this case that its own automatic timing equipment actually recorded 33 minutes of chargeable time for the call in question. C&P is able to show only that its own automatic timing equipment *could have* recorded 33 minutes for this call. Although we are ordering a refund on the November 17, 1970 toll call, we are not ordering a refund on any other toll call complainant made between August 1, 1970 and December 13, 1972. Complainant merely *assumes* that he was overcharged on other toll calls and alleges no facts whatsover to support such claim. There is no allegation, for example, that he attempted to time any of these calls himself.

3. We also note that C&P has submitted pursuant to our requests, detailed, and specific information describing the functioning of its automatic timing equipment and its billing equipment and describing the billing procedures relating thereto. We have examined such information and are of the opinion that defendant is using equipment and following practices that are generally used and followed throughout the industry and that there is no reason for us to take any further action at this time to require any changes in such equipment or practices. However, we are making no specific finding regarding the degree of accuracy or inaccuracy of C&P's timing and billing equipment or of its billing procedures nor are we approving or disapproving the various measures utilized by C&P to verify the accuracy and reliability of its equipment and its billing procedures. We hold only in this case that C&P, upon being served by us with the complaint herein, should have retained its records to show the timing of the call as recorded by its automatic timing equipment and that, failure to do so, warrants refund of the amount claimed by the customer based upon his own timing of the call.

4. Accordingly, IT IS ORDERED, That C&P shall within 30 days from the release date hereof, refund $0.45 plus any taxes thereon to complainant; and that within 10 days after such refund has been paid to complainant, C&P shall certify to the Commission in writing that such payment has been effected.

5. IT IS FURTHER ORDERED, That complainant's request for relief IS GRANTED to the extent indicated above and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-131

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of SOUND MEDIA, INC. (WKIK), LEONARDTOWN, MD. Has: 1370 kHz, 1 kW, day Requests: 1370 kHz, 1 kW, DA-N, U For Construction Permit	File No. BP-19398

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 13, 1974)

BY THE COMMISSION:

1. Before the Commission for consideration are (i) its Memorandum Opinion and Order of November 14, 1973, granting the above application by the licensee of station WKIK for unlimited-time operation, *Sound Media, Inc.*, 43 FCC 2d 960; (ii) a petition for reconsideration of that action filed pursuant to section 405 of the Communications Act of 1934, as amended, by Key Broadcasting Corporation, licensee of station WPTX, Lexington Park, Maryland; and (iii) opposition to the petition by Sound Media.

2. Key Broadcasting, whose petition to deny was denied when the Commission granted WKIK's application, is presently engaged in a comparative hearing in Docket No. 19410 with Sound Media. Both parties seek authorization for a new FM station on channel 249A in their respective communities.[1] In its petition to deny, Key Broadcasting claimed that WKIK did not meet the unserved area standard of section 73.37(e)(2)(ii), since a grant of either FM application in hearing would eliminate entirely the unserved area and population coverage within WKIK's interference-free nighttime service area. In granting the application, however, we pointed out that even though a grant of either FM would have eliminated the unserved area and population coverage required under section 73.37(e)(2)(ii), WKIK qualified for a grant under the alternative provisions of section 73.37(e)(2)(iii)[2] in that it would provide Leonardtown with its second aural nighttime service. Petitioner, for the first time, now argues that channel 249A *is* an "available" channel. In support, petitioner cites note 6 to section 73.37 which reads:

> No FM channel is available for use in the community (see (e)(1)(ii) and (e)(2)(iii)), if no channel is assigned to the community for commercial use in the

[1] The channel is assigned to Leonardtown but may be used in Lexington Park under the "10-mile rule," section 73.203(b).

[2] Section 73.37(e)(2)(iii) enables applications which do not provide 25 percent unserved area or population coverage to qualify if ". . . no FM channel is available for use in the community . . . and at least 20 percent of the area or population of the community receives less than two nighttime aural services."

FM Table of Assignments (§ 73.202(b)), as amended by Commission action as of the date the application is tendered, or, if assigned, is occupied by an authorized facility, and no unoccupied channel can be utilized to serve the community pursuant to § 73.203(b).

3. Petitioner also cites language from the *Report and Order on AM Station Assignment Standards* adopted in 1964, 2 RR 2d 1658, expressing the Commission's concern about degradation of the AM nighttime spectrum through continued prolifieration of new nighttime operations. Finally, Key Broadcasting points out that a rule-making proceeding in Docket 19784 may result in the future assignment of another FM channel in the Leonardtown-Lexington Park area.

4. Petitioner is indeed correct in its argument that the Commission in 1964 was concerned about incremental interference and degradation of nighttime AM service. It was specifically that reason which persuaded us at the time to adopt a rule which required applicants for new nighttime operations to meet the 25-percent unserved area or population criterion. See former section 73.24(b)(3). In the rule-making proceeding in Docket No. 18651 which led to the adoption of our present rules, however, many parties urged the elimination of the 25-percent unserved area concept on the grounds that the Commission was pursuing an impossible objective at the expense of the manifest need for more service in growing areas. We rejected this argument, however, in favor of an approach which retained the 25-percent unserved area concept while at the same time enabling applicants to qualify for facilities for communities where service was "inadequate" by meeting the second aural nighttime service standard embodied in the present section 73.37(e)(2)(iii). *Report and Order in Docket No. 18651*, 39 FCC 2d 645 at 668–671. In addition to fostering the inauguration of new service to inadequately served areas, this new policy was designed to liberalize the more stringent 25-percent unserved area requirement while encouraging the use of unoccupied FM spectrum space. Thus, although the Commission will continue its efforts to preclude new nighttime authorizations which represent unwarranted encroachments into the AM band, petitioner's concern, while valid in 1964, has little relevance when viewed in the light of subsequent rule making.

5. By the same token, petitioner's argument regarding the possibility that future rule making may result in the assignment of another FM channel to the Leonardtown-Lexington Park area has no bearing on the question now before us. Our present AM rules, as well as the former acceptability standards, would be impossible to administer if we permitted future contingencies to govern. Moreover, it would be manifestly unfair to expect applicants who had designed and filed proposals in good faith which complied in all respects with the rules then in force to await the outcome of future allocations over which they had no control.

6. Petitioner's principal contention, on reconsideration, as set out in paragraph 2, above, is that Sound Media's proposal is unacceptable because the applicant failed to establish the unavailability of an FM channel, thus failing to meet the requirements of section 73.37(e)(2)

(iii).[3] This argument, we believe, ignores the effect of the fact that Sound Media is presently engaged in a comparative hearing with petitioner in Docket No. 19410 in an effort to bring Leonardtown its first nighttime aural service. No matter which party prevails, Leonardtown will still lack "adequate" nighttime aural service as contemplated by the new rules, since fewer than two signals will provide primary service to the area. A reading of pages 667 to 676 of the *Report and Order*, *supra*, makes it quite clear that the Commission's intent is to provide each community, insofar as possible, with two aural services, while at the same time favoring the use of FM over AM. It was for this reason that we required potential applicants to first seek available FM channels. Sound Media has complied with the intent of this policy by applying for the only FM channel assigned to Leonardtown. Inasmuch as Sound Media has done all that the rules contemplate, there is no logical reason to preclude it from taking the next step; namely, seeking the second aural nighttime service for Leonardtown. In this manner, since an FM station in either Lexington Park or Leonardtown will provide primary service to Leonardtown, addition of the second nighttime service will take the community out of the "inadequately" served category. Thus, we find that Key Broadcasting has failed to persuade us that our previous ruling was erroneous.

7. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Key Broadcasting Corporation IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

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[3] This argument is at variance with the position Key Broadcasting took in its petition to deny. There petitioner contended, as noted in paragraph 2, *supra*, that the applicant failed to meet the 25-percent unserved area requirement of section 73.37(e)(2)(ii) because a grant of either of their mutually exclusive FM applications in hearing would eliminate Sound Media's unserved area coverage.

F.C.C. 74-218

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
WAIVER OF REQUIREMENTS OF SECTION 317 OF THE COMMUNICATIONS ACT GRANTED TO STATE BROADCASTERS' ASSOCIATIONS IN CONNECTION WITH "NCSA PLANS"

MEMORANDUM OPINION AND ORDER

(Adopted February 27, 1974; Released March 5, 1974)

BY THE COMMISSION: COMMISSIONERS BURCH, CHAIRMAN; AND HOOKS CONCURRING BUT WOULD HAVE RESCINDED ALL WAIVERS AS OF A DATE 6 MONTHS FROM ISSUANCE OF THE MEMORANDUM OPINION AND ORDER.

1. The Commission has under consideration (1) waiver of the requirements of Section 317 of the Communications Act of 1934, as amended, which has been granted to a number of state broadcasters' associations in connection with "Non-Commercial Sustaining Announcement" plans; and (2) information obtained regarding the operation of such plans.

BACKGROUND OF THE MATTER

2. Since 1962 the Commission has, under authority of Subsection (d) of Section 317 of the Communications Act and based upon petitions by a number of states broadcasters' associations, found that the public interest, convenience or necessity does not require that public service announcements broadcast under specified conditions by members of the associations be announced as sponsored or logged as commercial even though the state associations receive contributions from some of the non-profit organizations whose announcements are so broadcast. The state associations assist such organizations in planning, preparing, producing and/or distributing their announcements to member stations.[1]

3. In granting the first such waiver (*Southern California Broadcasters Association;* see footnote 1) the Commission stated that,

> Passing solely upon the facts before it, the Commission is of the view that it cannot be determined that no consideration inures to the member stations of SCBA as a result of the contributions made to the Association by the non-profit organizations. Under the circumstances, Section 317(a) of the Communications Act would appear to require program material broadcast on behalf of such non-profit organizations to be identified as sponsored, and the Commission's Rules

[1] See, for example, letters to *Southern California Broadcasters Association*, 24 RR 284 (1962); *Kansas Association of Radio Broadcasters*, 4 FCC 2d 267 (1966); *Wyoming Association of Broadcasters*, 21 FCC 2d 238 (1969).

would require such program material to be logged as commercial.[2] However, the Commission has also considered the compelling public interest benefits which flow to non-profit organizations of this type and to the public from these broadcasts and has concluded that (a) under these circumstances and in accordance with Subsection (d) of Section 317, public interest, convenience or necessity would be served by waiving the requirements of sponsorship identification, and (b) such material may continue to be logged as sustaining.

It was represented by the SCBA that no commitments or promises were made as consideration for the contributions and that all of the contributing organizations had for many years received time, announcements and similar cooperation from radio stations without regard to any contribution made to the Association.

4. Although there were no other precise conditions placed upon the waiver granted the Southern California Broadcasters Association, in making additional grants some years later the Commission set forth more specific conditions. Thus, in granting a waiver of Section 317(a) to the Wyoming Association of Broadcasters (footnote 1, *supra*), the Commission stated,

> In considering your request, we have noted that only your executive committee is aware of whether a contribution has been made to the association. In addition, we have noted that all requests from public service, nonprofit organizations will be processed in the same manner, whether or not a contribution is made; that such organizations have been apprised of this fact; and that your member stations will not know whether or not a contribution has been made.

In granting the Wyoming request the Commission also stated,

> However, the Commission is concerned with the possibility that some of the nonprofit organizations . . . will be prompted to contribute by a belief that they will be discriminated against if they fail to contribute. In view of the representations contained in your letter, it is expected that in such eventuality you will take effective action to dispel any such misapprehension.

Similar language was appended to many other letters granting the requested waiver.

3. Monies received by state associations from non-profit organizations are in most cases used not only to finance the associations' assistance in preparing and distributing public service announcements or other program matter, but also to defray the general operating costs of the associations, as many associations have candidly indicated in requesting waiver of Section 317(a). In some states, part of the contributions also is used to finance college scholarships or to defray the costs of attending radio operator schools. The assistance rendered the nonprofit organizations ranges from merely advising member stations of the names and addresses of organizations seeking air time, to distributing spots prepared by the public service organizations and to writing and producing the spots, as well. Most state groups use the phrase, "Non-Commercial Sustaining Announcement plan" (hereinafter NCSA) in referring to the arrangement set forth above.

6. In an effort to ascertain the ways in which such NCSA plans were being operated, the Commission sent letters to all state associations asking which operate NCSA or similar plans and, if so, detailed information regarding operation of the plans.

[2] In its subsequent grants of similar waivers, the Commission also stated that Section 317(a) was applicable and that a Commission grant of a waiver pursuant to Subsection (d) was necessary if announcements from contributing organizations were not to be identified as sponsored and logged as commercial.

RESPONSES OF ASSOCIATIONS

7. Responses reveal that broadcasters' associations in 19 states operate NCSA or similar plans and that two of the associations have not applied for or been granted waiver of the provisions of Section 317(a). Thirty-one states and the District of Columbia operate no NCSA plan. The maximum amount received in contributions in 1972 under such a plan was approximately $24,000, representing 37 per cent of that association's total income. (In three cases, contributions represented 50 or more per cent of total income.) The smallest amount contributed was $150, representing less than one per cent of total income. Only four of the 19 reporting groups report that all of the money contributed was spent on processing, writing or distributing PSAs for non-profit organizations or for college scholarships. Most of the other state associations spent most of the contributed money on general operating expenses or their conventions. The proportion of contributions spent for operating expenses ranged up to 100 per cent. All associations deny that promises or agreements have been made for preferential treatment of contributing organizations; however, it is obvious from other data supplied that in some cases, where all or most of the associations' contributions come from a single source or only two or three sources (e.g., state tourist departments or state fairs), that preferential treatment is being given such contributors. One association states candidly that if any other non-profit organization than its sole (and substantial) contributor sought assistance on a regular basis, the association would be inclined to discuss with it "the desirability of a contribution."

8. As to actions taken to dispel a possible belief by non-profit organizations that their material will be discriminated against unless they make contributions, some associations include such a statement in printed matter distributed to non-profit organizations,[3] some state they give such assurances orally, and others state that it is generally known that a contribution is not necessary. Responses reveal that requests for assistance are reviewed by only one official of the association in one instance, by two in others and by the entire board of directors of the association or a committee of its members in still others. The same holds true generally with respect to the persons having knowledge of which non-profit organizations have made contributions, and in what amounts. Most associations state that member stations do not know which organizations contribute, but one states its members are informed that "this is a special project" of the association, another states there is no reason why a member would not be informed if it inquired, a third candidly admits that member stations know who contributes. In certain other states, where the association receives its entire contribution from a single organization or only two or three organizations, there is reason to suspect that the member stations are aware of the arrangements.

9. Most state associations report that member stations are requested to report the number of spots broadcast for each campaign assisted by

[3] We believe, however, that printed or mimeographed material distributed by some associations is misleading in that it states that the Commission has "approved" their NCSA plans and "given permission . . . to ask for a contribution for making this program available." Such language implies a direct endorsement by the Commission of attempts to obtain contributions, whereas the Commission merely granted a waiver of the provisions of Section 317(a) under certain conditions.

the association, and that such information is forwarded to the non-profit groups assisted, but that no discrimination in this respect is made between contributing and non-contributing organizations. However, in a few instances it appears that only contributors receive such reports. Almost all associations state that the spots they distribute to member stations are logged as PSAs (i.e., non-commercial), although a few state that some stations may log them as commercial.

10. The associations also were requested to list all campaigns assisted in calendar 1972, the nature of the assistance given, the number of spots broadcast by their members for each campaign if such information is available, and the amount, if any, contributed by each organization assisted. The responses reveal that from only one to as many as 23 organizations were assisted and that the assistance ranged from merely informing member stations of the names and addresses of non-profit organizations wishing assistance (which could then be contacted directly by each station if it desired) to distributing spots prepared by non-profit groups, to writing *and* distributing such spots, and, finally, to writing, producing and distributing spots. The reports in many cases indicate that no discrimination was practiced against non-contributors, in that the number of spots broadcast by member stations did not appear to vary in accordance with whether contributions were made, or the amounts of the contributions. In a few cases, however, assistance was granted *only* to contributing organizations and in still others there is reason to conclude that considerably more assistance was granted contributors than non-contributors (e.g., see last sentence of par. 7 above).

DISCUSSION

11. On the basis of the responses received, it appears that many state associations are not operating their NCSA plans in the manner contemplated by the Commission when it granted waiver of the provisions of Section 317(a), and that in some instances the state association is in effect serving as an advertising agency, collecting funds from non-profit organizations which then become, for all practical purposes, sponsors of the announcements broadcast on their behalf. These accounts are serviced much as an advertising agency might, and much or even most of the monies so received by many state organizations are used for their general operating expenses, thus proportionately reducing the amounts their members need contribute for this purpose. Although almost all associations state that they do not inform members which non-profit organizations make contributions, some acknowledge that they do so inform members and in some other cases, it strains credibility to assert that member stations do not have such knowledge, e.g., when one or two or three organizations are the only contributors.

12. We believe on the basis of the information available to us that many of the NCSA plans are not being operated as contemplated by us in granting waivers. Moreover, by the very nature of the arrangement, such plans are always likely to be conducted in a manner inconsistent with the assumptions on which the waivers were granted. It obviously is difficult, if not impossible, to conceal from member stations the identity of groups making contributions, and if member licensees have such knowledge, there is an obvious difficulty in treating non-contributors in exactly the same manner as contributors. More-

over, even if member stations have no such knowledge, there also is obviously a human temptation on the part of officials of the state associations to give a *quid pro quo* to contributors, since they are in many cases contributing one-half or more of the funds used by the association for general operating expenses and conventions.

13. As we have made clear many times, the obligation of each licensee is to ascertain the principal problems and needs of the area it serves and to program in such a way as to be responsive to those problems and needs. These interests are paramount, not the private interests of the licensee or its advertisers.[4] In the present case, the licensee's acceptance of public service announcements or other material provided by the state broadcaster's association must be based on the public interest, not on whether money is received either directly by the licensee or indirectly by reduction of the amount the licensee need contribute to the support of its state association. We now believe that continued grant of waivers of Section 317(a) for NCSA and similar plans will tend to interfere with implementation of this policy, and therefore that all waivers previously granted must be rescinded after allowing a reasonable period of time for the associations to make whatever adjustments are necessary.

14. In no sense do we wish to imply that state broadcasters' associations do not provide a valuable service to their members or to broadcasting generally; to the contrary, most associations play a most useful role in providing for an interchange of ideas among their members, in informing them of statutes and Commission rules and policies affecting broadcasters, and in providing a means for collective expression to the Commission, the Congress and the public of the views of broadcasters. We wish to emphasize that we are not prohibiting acceptance of contributions by state associations from non-profit organizations, or the expenditure of substantial parts of such contributions on general association operating expenses. What we are doing is rescinding our grants of waivers of the provisions of Section 317(a) so that all announcements or programs broadcast by stations on behalf of contributing organizations must be announced and logged as sponsored and by whom, and computed as commercial matter. Thus, rescission of the waivers need not end acceptance by state associations of contributions, although we recognize that in some instances it may have the effect of reducing them in number.

15. Accordingly, for the reasons set forth above, IT IS ORDERED That all waivers granted to date of the provisions of Section 317(a) of the Communications Act of 1934, as amended, with respect to announcements on behalf of contributing organizations ARE RESCINDED effective March 1, 1975.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

[4] See, for example, our Public Notice on program-length commercials, 39 FCC 2d 1062, 26 RR 1023 (1973), and the cases cited there, where we expressed, among other things, our concern as to subordinating the public interest to the interests of advertisers or to the station's own economic interests. In adopting the Primer on the ascertainment of community problems by broadcast applicants, we emphasized that applicants are judged by the public interest standard, not their private economic interests, 27 FCC 2d 650, 676, 21 RR 2d 1507, 1533 (1971). This policy has deep roots. The Federal Radio Commission stated in its second annual report (1928) at page 168: "While it is true that broadcasting stations in this country are for the most part supported or partially supported by advertisers, broadcasting stations are not given these great privileges by the United States Government for the primary benefit of advertisers. Such benefit as is derived by advertisers must be incidental and entirely secondary to the interest of the public."

F.C.C. 74-82

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Public Notice
CONCERNING THE RANKING OF THE "TOP"
TELEVISION MARKETS IN RE CONCENTRATION
OF CONTROL POLICY

JANUARY 30, 1974.

RANKING OF "TOP 50" TELEVISION MARKETS FOR PURPOSE OF THE POLICY ON CONCENTRATION OF CONTROL

On February 7, 1968, the Commission terminated Docket No. 16068 in its Report and Order, 22 F.C.C. 2d 696. In paragraph 17 of that Report and Order we described our "top 50" policy with respect to concentration of control as follows:

> In particular, in light of the special problems concerning the top 50 markets set forth in the Notice of Proposed Rule Making herein, we will expect a compelling public interest showing by those seeking to acquire more than three stations (or more than two VHF stations) in those markets.

For the purpose of this policy, the "top 50" markets were ranked on the basis of the American Research Bureau's net weekly circulation of the largest station in the market.[1] We are advised that ARB no longer regularly ranks markets by this measure and we are therefore changing the basis for ranking the top 50 television markets for purposes of the subject policy statement.

Accordingly, for all applications tendered for filing after April 1, 1974, we shall use the ARB market ranking based on prime time households (average quarter-hour audience during prime time, all home stations). This ranking is published annually in the ARB "Television Market Analysis." The ranking that will be used with respect to a particular application will be that appearing in the most recent issue of the "Television Market Analysis" at the time the application is tendered for filing.

Action by the Commission January 30, 1974. Commissioners Burch (Chairman), Lee, Reid, Wiley and Hooks.

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[1] See footnote 3 of the Notice of Proposed Rule Making and Memorandum Opinion and Order in Docket 16068, adopted June 21, 1965, FCC 65-547, 30 Fed. Reg. 8166; and Public Notice, adopted June 21, 1968, FCC 65-548, 30 Fed. Reg. 8173.

F.C.C. 74-189

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of THE UNITED TELEPHONE CO. OF PENNSYLVANIA For Certificate of Convenience and Necessity To Construct and Operate Cable Facilities in Hanover, Pa.	Docket No. 19711 File No. P-C-7720

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. On December 17, 1973, we released an Order (FCC 73-1296) denying The United Telephone Company of Pennsylvania's (United) application for review of an interlocutory ruling of the Review Board, which ruling, among other things, refused to delete an issue herein inquiring into alleged anticompetitive or monopolistic practices engaged in by United. Now before us for consideration are the following pleadings: (a) United's motion for stay of the above-described Order (filed February 13, 1974) pending final disposition by the United States Court of Appeals for the Third Circuit of a petition for review of such Order filed by United on February 7, 1974; and (b) the joint opposition thereto, filed February 14, 1974, by the Chief, Common Carrier Bureau and the Acting Chief, Cable Television Bureau.

2. We shall deny United's motion for stay and we shall dismiss as moot United's alternative request for relief that we postpone temporarily the hearing herein, which began on February 19, 1974, until the motion for stay has been decided. We have considered the arguments advanced by United in support of its motion for stay, but we find them to be unpersuasive inasmuch as they are essentially the same arguments which were considered fully and rejected in previous actions which have been taken herein. In short, United's contentions do not satisfy the standard which is applicable to requests for stay, i.e., United has not shown that failure to grant a stay would lead to an irreparable injury to the public interest, or to its own interest, and it has not demonstrated that it is likely to succeed on the merits of its pleadings.

3. Accordingly, IT IS ORDERED, That the above-described motion for stay, filed February 13, 1974, by The United Telephone Company of Pennsylvania IS DENIED.

4. IT IS FURTHER ORDERED, That the above-described request for alternative relief IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74–188

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LIABILITY OF WINSLOW COMMUNICATIONS, INC., LICENSEE OF RADIO STATION KINO, WINSLOW, ARIZ.
For Forfeiture

MEMORANDUM OPINION AND ORDER

(Adopted February 21, 1974; Released February 25, 1974)

BY THE COMMISSION: CHAIRMAN BURCH ABSENT.

1. The Commission has under consideration (1) its Notice of Apparent Liability for forfeiture dated May 23, 1973, issued to Winslow Communications, Inc., the licensee of Radio Station KINO, Winslow, Arizona, and (2) the licensee's response dated June 19, 1973 to the Notice of Apparent Liability.

2. The Notice of Apparent Liability for forfeiture in the amount of five hundred dollars ($500) was issued to the licensee in this proceeding for violation of Section 73.93(b) of the Commission's Rules in that a third-class radiotelephone operator, whose license was not endorsed for broadcast purposes, was in actual charge of the transmitting system of Station KINO on dates and at times in 1972 as follows:

June 15, 4:30 p.m. to 10:00 p.m.
June 16, 4:00 p.m. to 6:30 p.m.
June 17, 6:30 p.m. to 10:00 p.m.
June 18, 6:30 p.m. to 10:00 p.m.
June 19, 3:30 p.m. to 10:00 p.m.
June 20, 4:00 p.m. to 10:00 p.m.

3. In response to the Notice of Apparent Liability, the licensee does not deny that the violations occurred as stated, but requests that it not be held liable for the forfeiture in that the violations occurred during the time when an application for consent to transfer control of the corporate stock of the licensee was pending before the Commission. The licensee explains that the transfer of control involved the sale of stock by the former general manager and another stockholder who together transferred seventy per cent of the issued and outstanding stock to the present President of the licensee, and that the violations occurred when the former general manager was in control of operations, between the date of the sales agreement (April 18, 1972) and the date that the transfer was granted (November 30, 1972). The licensee further states that the former general manager failed to notify either the corporation or the transferee of the violations either before or after the sale.

4. We find that the licensee repeatedly violated Section 73.93(b) of the Commission's Rules in having an improperly licensed operator

in actual charge of the transmitting system on the dates and times above set forth. Licensees will not be excused for violations that occurred during the time that a former general manager was in charge of operation of the station. *El Centro Radio, Inc.*, 10 FCC 2d 229 (1967), 11 RR 2d 375. We have consistently held that licensees are responsible for the acts of their employees. *Eleven Ten Broadcasting Corporation*, 32 FCC 706 (1962); *Continental Broadcasting, Inc.*, 15 FCC 2d 120 (1968); *The McLendon Corporation*, 18 FCC 2d 224, 228 (1969). It is the licensee which is responsible for compliance and not the individual stockholders. The transfer of control of stock of the licensee corporation subsequent to the violations does not excuse the licensee for the violations. We have carefully considered the licensee's response and the circumstances of this case and are of the opinion that the licensee's grounds are inadequate to support its request for relief from liability.

5. In view of the foregoing, IT IS ORDERED That Winslow Communications, Inc., the licensee of Radio Station KINO, Winslow, Arizona, FORFEIT to the United States the sum of five hundred dollars ($500) for repeated violation of Section 73.93(b) of the Rules. Payment of this forfeiture may be made by mailing a check, or similar instrument, to the Commission drawn payable to the order of the Federal Communications Commission. Pursuant to Section 504(b) of the Communications Act of 1934, as amended, and Section 1.621 of the Commission's Rules an application for remission or mitigation of the forfeiture may be filed within thirty (30) days of receipt of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

F.C.C. 74-134

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WTWV, INC., TUPELO, MISS. For Construction Permits	Files Nos. BPTI-1849, BPTI-1850, BPTI-1851, BPTI-1852, BPTI-1853, BPTI-1854, BPTI-1855, BPTI-1856, BPTI-1857, and BPTI-1858

MEMORANDUM OPINION AND ORDER

(Adopted February 6, 1974; Released February 13, 1974)

BY THE COMMISSION:

1. The Commission has before it applications (File Nos. BPTI-1849 through 1858) of WTWV, Inc. (hereafter "WTWV"), of Tupelo, Mississippi, licensee of WTWV, channel 9, Tupelo, for authority to construct an intercity relay system between its transmitter at Woodland, Mississippi, and the transmitter of commonly owned WHTV,[1] channel 24, Meridian, Mississippi, operated as a 100-percent satellite of WTWV.

2. The Commission also has before it a "Petition to Deny, or Alternatively, to Condition Grant," filed May 8, 1973, by Southern Television Corporation (hereafter "Southern"); a "Response" of WTWV, filed May 16, 1973; and a "Reply to 'Response of WTWV, Inc.,'" filed by Southern May 30, 1973.[2]

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[1] Licensed to Central Television, Inc. (hereinafter "Central").

[2] The following pleadings, requesting substantially similar relief and interposing similar defenses to those raised in the instant proceeding, have been filed and are subsumed in our disposition of this case: a "Petition to Deny Application to Remain Silent, and to Condition Future Operating Authority," filed by Southern November 21, 1972, and directed against an anticipated application of Central Television, Inc., for an extension of temporary authority for WHTV to remain silent; a Motion to Dismiss, filed December 6, 1972, by Central; and an Opposition to Motion to Dismiss, filed December 20, 1972, by Southern (such an extension of temporary authority was, in fact, never requested, as WHTV returned to the air December 6, 1972, operating as a satellite of WTWV); a "Petition to Modify Temporary Authority and to Condition Future Operating Authority," filed by Southern January 9, 1973, and directed to temporary authority pursuant to which WTWV was operating pending proof of performance of certain new facilities authorized by construction permit (file No. BPCT-4394); a Motion to Dismiss filed January 24, 1973, by WTWV; and an Opposition to Motion to Dismiss filed by Southern on February 7, 1973.

3. At the outset, we deal with WTWV's contention that a petition to deny is not available to oppose applications of this kind. We agree. Petitions to deny are authorized by section 309(d)(1) of the Communications Act of 1934, as amended, in the case of applications for facilities described in section 309(b) of the Act. Section 309(c) exempts from the operation of subsection (b) (and therefore from subsection (d)) applications for certain enumerated facilities, including "facilities for remote pickups, studio links and similar facilities for use in the operation of a broadcast station. . . ." Section 309(c)(2)(E). We think this describes a class of auxiliary broadcast services that includes intercity relay facilities. We are buttressed in this conclusion by the knowledge that the petition to deny is an integral part of a system of pre-grant procedures, including the publication of notice and the 30-day waiting period established by section 309(d)(1) of the Act before applications to which section 309(b) applies can be granted or designated for hearing. See *Hearings on H.R. 7017, etc., before the Subcommittee on Communications and Power of the Committee on Interstate and Foreign Commerce of the U.S. House of Representatives*, 86th Cong., 2d sess., April 12 and 13, 1960, at 133–135.

4. The language of section 309 of the Act, as amended in 1960, had as its source a draft submitted jointly by the Commission and the Federal Communications Bar Association to the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce. *Hearings on S. 1733, etc., Before the Communications Subcommittee of the Committee on Interstate and Foreign Commerce of the U.S. Senate*, 86th Cong., 1st sess., June 9 and 11, 1959, at 36–39. As the co-originator of the statutory provision, the Commission has never understood that the pre-grant system of procedure established by the Act applied to intercity relay systems. The Commission does not give public notice of the filing of applications for intercity relay systems or observe the 30-day delay period before grant or designation of such applications for hearing, and applicants are not required to give local notice of filing under section 1.580 of the rules.

5. The reason for treating remote pickups, studio transmitter links *and* intercity relay systems in such a fashion, i.e., outside the parameters of section 309(d)(1), is apparent from their truly "auxiliary" nature. Under Part 74 of our rules (section 74.631(e)), these sorts of facilities are licensed only to broadcast licensees of the Commission. Thus, they are dependent for their existence on the Commission's prior determination that the broadcaster is qualified to be a licensee and that authorization of the broadcast station would serve the public interest. We, therefore, conclude that the pre-grant system of procedure established by the 1960 amendments to the Communications

Act (P.L. 86–752, approved September 13, 1960, 74 Stat. 889) does not apply to applications for television intercity relay systems.[3]

6. Although we decide that a petition to deny may not be filed against an application of this sort, we believe that Southern's allegations raise unique and important questions affecting the public interest. We shall, therefore, treat Southern's pleadings as an informal objection under section 1.587 of our rules, and, after a discussion of the relevant history of this case, proceed to the merits.

7. The true reason for Southern's objection is the assignment (approved by the Commission March 23, 1972) of the license of WHTV by Delta Communications Corporation, the bankrupt licensee, to Central Television, Inc., to operate as a one hundred-percent satellite of WTWV. Southern did not at any time interpose with the Commission any objection to the assignment. Nevertheless, Southern now alleges that the operation of WHTV as a one hundred-percent satellite contravenes Commission policy against locating satellites in communities already served by a local television station.[4] The crux of Southern's complaint, however, is not the establishment of another television service in the community, but the alleged anti-competitive impact of the joint buying power of WTWV/WHTV on the market for syndicated programs. Southern claims WTOK–TV will never be able to compete with the WTWV/WHTV consortium in the purchase of syndicated programs because WTWV/WHTV, representing the combined market areas of Meridian and Tupelo, will always be able to offer a greater purchase price.[5] Southern also alleges that once WTWV/WHTV have purchased such programs, they will obtain territorial exclusivity in the Meridian market, as part of the purchase agreement.[6] This will result, it is alleged, in lower overall quality of programming for WTOK–TV's viewers, including some 17,000 persons who will still be reliant on WTOK–TV as their only source of television service, even if the pending application of the American Public Life Broadcasting Company for the remaining commercial channel assigned to Meridian, channel 30, is granted.

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[3] A petition for reconsideration is always available to a person adversely affected by a grant of an intercity relay station, under section 405 of the Act, and section 1.106 of our rules.

[4] See, e.g., *In the Matter of Amendment of Section 73.35, 73.250 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 3 RR 2d 1554, at 1563, where the Commission said: "We shall require applicants proposing such operation [i.e., satellites] to make a showing as to why the satellite form of operation is necessary for the community for which they are applying . . . [I]n general satellite grants will be made only in communities having no local television stations."

[5] A potential third entry in the Meridian market is the American Public Life Broadcasting Co., licensee of WAPT–TV, Jackson, Mississippi, and applicant for channel 30, Meridian (BPCT–4548), which it proposes to operate on a satellite basis. Southern has objected to a grant of that application, and asks that it be consolidated with our consideration of these applications. For various reasons, including an outstanding petition to deny against the renewal of WAPT–TV, we do not accede to that request.

[6] Southern has submitted the affidavit of its President to the effect that he was unable to purchase two program series for WTOK–TV because WTWV had obtained territorial exclusivity in Meridian.

8. Southern, therefore, requests that the Commission deny these applications, or alternatively, restrict any operating authority to avoid the alleged anti-competitive effects of the satellite operation. Specifically, Southern suggests that in the purchase of syndicated programs the applicant be required to contract separately for Tupelo and Meridian markets, and that copies of all such contracts be filed with the Commission; and that the applicant be prohibited from broadcasting over the facilities of WHTV any syndicated programs on which WTOK–TV has not been afforded any opportunity to bid.

9. After careful consideration of Southern's allegations, we conclude that the actual impact of the WHTV satellite on WTOK–TV's ability to purchase syndicated programs for the Meridian market (and, concomitantly, the impact on the quality of WTOK–TV's non-network programming) is too speculative to be assayed with any definiteness. Therefore, we find it impossible to say that it outweighs the public interest benefits of providing a quality signal at the WHTV transmitter site for rebroadcast to the Meridian area, most of which, by virtue of the satellite operation, is receiving full-time NBC network service for the first time.

10. We are also unpersuaded of the wisdom of the alternative Southern suggests: conditioned operating authority. Southern's proposal would leave WTOK–TV, because it is an established local VHF station, in a preeminent position *vis a vis* WHTV in the purchase of non-network programming for the Meridian market. Consequently, WTWV would be placed on the horns of a dilemma: either render its satellite useless by keeping it dark during those hours WTWV was broadcasting programs for which WTOK–TV had obtained exclusive rights in Meridian, or allow the availability of programs to its Meridian satellite to dictate what would be shown in Tupelo.

11. As a general rule, we decline to involve ourselves in attempting to equalize competition on a market-by-market basis. Southern appears, in this case, to have encountered the same competitive forces that face any independent station confronting a multiple owner in the same market. We have addressed ourselves to the subject of exclusivity agreements with respect to non-network programs in Docket No. 18179, *In the Matter of Amendment of Part 73 of the Commission's Rules with Respect to the Availability of Television Programs Produced by Non-Network Suppliers to Commercial Television Stations and CATV Systems.*[7] That proceeding does not, however, bear on the situation raised in this case.

12. In view of the above, it is hereby ORDERED that the informal objections filed by Southern Television Corporation ARE DENIED in their entirety, and the applications of WTWV, Inc. (file Nos. BPTI–1849, BPTI–1850, BPTI–1851, BPTI–1852, BPTI–1853,

[7] First Report and Order (FCC 73–806), adopting proposed rule 73.685(m), adopted by the Commission July 26, 1973; stayed pending reconsideration by Memorandum Opinion and Order of the Commission (FCC 73–890), adopted August 29, 1973.

BPTI–1854, BPTI–1855, BPTI–1856, BPTI–1857 and BPTI–1858), ARE GRANTED, in accordance with specifications to be issued.

IT IS FURTHER ORDERED, That the objections of Southern Television Corporation described in footnote 2 to this Opinion and Order, the issues therein being disposed of by our decision in this case and rendered moot, are DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*